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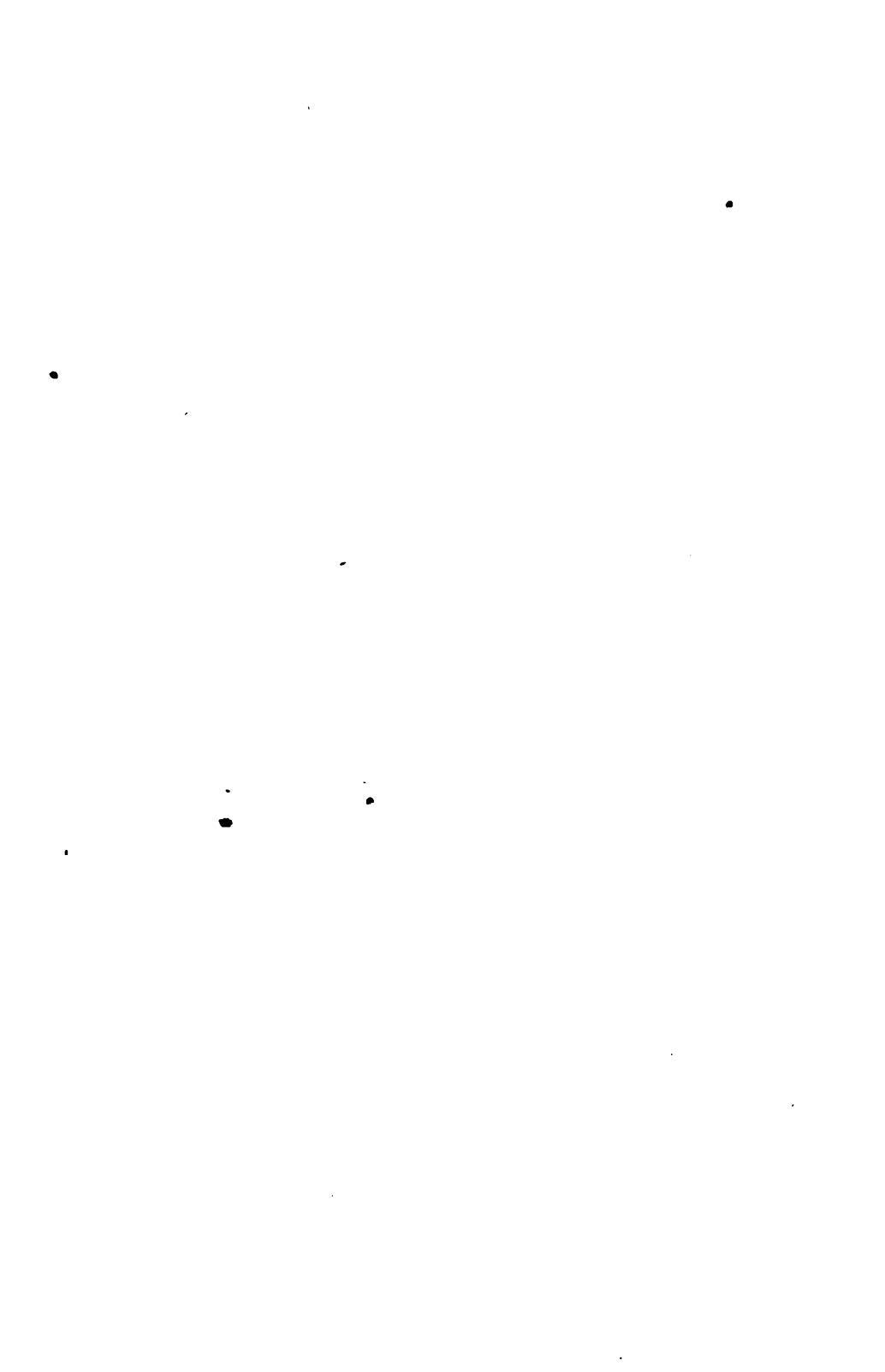
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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT

OF THE
STATE OF INDIANA

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-
BOOKS CITED, STATUTES CITED AND CONSTRUED, AN
INDEX, AND NOTES TO THE REPORTED CASES**

WILL H. ADAMS,
OFFICIAL REPORTER

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CONNOR D. ROSS,
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ASSISTANTS

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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA

WHOSE OPINIONS ARE CONTAINED IN THIS VOLUME

HON. MILTON B. HOTTEL.§¶
HON. JAMES J. MORAN.**
HON. JOHN C. McNUTT. §§
HON. JOSEPH G. IBACH. ¶
HON. IRA C. BATMAN. ¶¶
HON. ETHAN A. DAUSMAN. ¶¶
HON. FRED S. CALDWELL. ††
HON. EDWARD W. FELT. ¶

§ Chief Judge, May Term, 1917.

** Appointed February 10, 1915.

§§ Appointed April 28, 1916.

†† Appointed September 1, 1913, and elected in 1914.

¶ Elected in 1910, and reelected in 1914.

¶¶ Elected in 1916.

OFFICERS

OF THE

APPELLATE COURT

ATTORNEY-GENERAL,
ELE STANSBURY

REPORTER,
WILL H. ADAMS

CLERK,
J. FRED FRANCE

SHERIFF,
HARRY W. PEMBERTON

LIBRARIAN,
RICHARD W. ERWIN

CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1917, IN THE ONE HUNDRED AND FIRST YEAR OF THE STATE.

INDIANAPOLIS AND CINCINNATI TRACTION COMPANY
v. SHERRY.

[No. 9,314. Filed June 19, 1917.]

1. **STREET RAILROADS.—Injury to Property.—Contributory Negligence.—Burden of Proof.—Instructions.**—In an action for injuries to person and property sustained in a collision with a street car, an instruction placing on defendant the burden of proof as to the entire issue of contributory negligence is erroneous, since, in actions for damages to personal property, the burden is on the plaintiff not only to aver and prove that the injury to his property was caused by the negligence of the defendant, but also that he was not guilty of contributory negligence proximately causing the injury. p. 3.
2. **STREET RAILROADS.—Injuries to Person.—Instructions.—Pleading and Proof.**—In an action for injuries to person, an instruction directing a verdict for plaintiff if the jury found "that the plaintiff sustained injuries as alleged in the complaint," and that they were sustained by reason of defendant's negligence, is erroneous as not limiting the right of recovery to the acts of negligence alleged in the complaint, since, in an action for damages predicated on negligence, plaintiff is only entitled to recover on proof of acts of negligence charged in the complaint, regardless of what other negligence may be disclosed by the evidence. p. 4.
3. **APPEAL.—Review.—Refusal of Instructions.**—The rejection of an instruction, tendered in due time, and fairly stating the law as applied to the issues and the evidence, is reversible error, unless the subject-matter of such instruction is covered

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by others given, or it appears that the substantial rights of the party were not prejudiced by the refusal. p. 6.

4. WITNESSES.—*Examination.*—*Damages.*—*Question.*—In an action for damages to an automobile, a question as to “what it cost to repair the automobile” is objectionable as not limiting the cost of repairs, in determining the damages, to such repairs as were made necessary by defendant’s negligence. p. 7.
5. DAMAGES.—*Injury to Automobile.*—*Evidence.*—*Sufficiency.*—In an action for damages to an automobile, testimony, “I don’t know what it cost to repair it, but I know there was paid out \$420 to fix it up in running order,” being the only evidence on the subject of damages, is insufficient to sustain a verdict for plaintiff, since such evidence furnishes no basis for estimating the damages, especially where the automobile was a second-hand machine and not in first-class condition at the time of the accident. p. 7.

From Union Circuit Court; *George L. Gray*, Judge.

Action by Luther Sherry against the Indianapolis and Cincinnati Traction Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Kittinger & Diven, for appellant.

David W. McKee, Raymond S. Springer, Richard N. Elliot and Allen Wiles, for appellee.

BATMAN, J.—Appellee filed his complaint in the court below to recover damages on account of injuries to himself and to his automobile, alleged to have been caused by the negligent operation of one of appellant’s inter-urban cars at a street crossing in the city of Connersville, Indiana. Appellant answered by general denial. Trial was had by jury, and judgment was rendered in favor of appellee for \$1,000. From this judgment appellant prosecutes this appeal, and relies for reversal on the action of the trial court in overruling its motion for judgment in its favor on the interrogatories and answers returned by the jury with its general verdict for appellee, and in overruling its motion for a new trial. In the latter motion appellant bases error, among other things, on the action of the court in giv-

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ing certain instructions on its own motion, in refusing to give certain instructions tendered by it, and in admitting certain evidence over its objections.

Among the instructions given by the court on its own motion is No. 6, which reads as follows: "Under the issue formed by the pleadings filed, the plaintiff must prove the alleged negligence of the defendant railway company, by a fair preponderance of the evidence, and the defendant as a matter of affirmative defense must prove negligence on the part of the plaintiff at the time of the accident alleged, by a fair preponderance of the evidence."

Appellant contends that this instruction is erroneous. It bases this contention on the fact that appellee, by its complaint in this action, seeks to recover dam-

1. ages not only for injuries to himself but also for injuries to his automobile; and hence this instruction placed on it a greater burden than it was required to assume under the law. In this appellant is correct. The statute provides that in actions for damages brought on account of alleged negligence causing personal injuries, contributory negligence shall be a matter of defense, which may be proved under an answer of general denial. §362 Burns 1914, Acts 1899 p. 58. But in actions for damages to personal property on account of alleged negligence, the burden is on the plaintiff, not only to aver and prove that the injury to his property was caused by the alleged acts of negligence of the defendant but also that no negligence of his own contributed proximately thereto. *Potter v. Fort Wayne, etc., Traction Co.* (1908), 43 Ind. App. 427, 87 N. E. 694; *Cleveland, etc., R. Co. v. Moore* (1909), 45 Ind. App. 58, 90 N. E. 93; *Ackerman v. Pere Marquette R. Co.* (1914), 58 Ind. App. 212, 108 N. E. 144; *Fort Wayne, etc., Traction Co. v. Monroeville Home Tel. Co.* (1912), 179 Ind. 334, 100 N. E. 69;

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Evansville, etc., Traction Co. v. Williams (1915), 183 Ind. 633, 109 N. E. 963; *Pittsburgh, etc., R. Co. v. Dove* (1915), 184 Ind. 447, 111 N. E. 609. By giving instruction No. 6, the court placed the burden of proof as to the entire issue of contributory negligence on appellant. The courts have repeatedly held that placing the burden of proof of an issue on the wrong party to an action is reversible error. *Hunt v. Osborn* (1907), 40 Ind. App. 646, 82 N. E. 933; *Gas Belt Torpedo Co. v. Ward* (1908), 43 Ind. App. 537, 87 N. E. 1110; *Stouffer v. Stoy* (1910), 46 Ind. App. 180, 91 N. E. 250; *Fort Wayne, etc., Traction Co. v. Monroeville Home Tel. Co., supra*; *Evansville, etc., Traction Co. v. Williams, supra*. This instruction was not withdrawn, and none other was given on the same subject. The giving of it therefore constituted reversible error.

Appellant further contends that the court erred in giving instruction No. 19 on its own motion. This instruction reads as follows: "If you find from

2. the evidence in this cause that the plaintiff sustained injuries as alleged in the complaint, and that such injuries were sustained by the plaintiff by reason of the negligence of the defendant company, and without negligence on the part of the plaintiff, your verdict should be for the plaintiff in this action." Appellant's contention is that this instruction failed to limit the right of recovery to the acts of negligence alleged in the complaint, but opened wide the door and informed the jury that it might return a verdict for appellee if it found the injuries alleged in the complaint were the result of the negligence of appellant, whether alleged in the complaint or not. It is well settled that a plaintiff is only entitled to recover, in an action for damages predicated on negligence, by proof of one or more of the specific acts of negligence alleged in his complaint, and that a failure to make such proof will defeat his right of ac-

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tion, no matter what other acts of negligence are disclosed by the evidence. *Indianapolis, etc., Transit Co. v. Derry* (1904), 33 Ind. App. 499, 71 N. E. 912; *Chicago, etc., R. Co. v. Thrasher* (1904), 35 Ind. App. 58, 73 N. E. 829; *Plummer v. Indianapolis Union R. Co.* (1914), 56 Ind. App. 615, 104 N. E. 601; *Indiana R. Co. v. Maurer* (1902), 160 Ind. 25, 66 N. E. 156; *Terre Haute Electric Co. v. Roberts* (1910), 174 Ind. 351, 91 N. E. 941; *Indianapolis Traction, etc., Co. v. Mathews* (1911), 177 Ind. 88, 97 N. E. 320; *Sandy River, etc., Coal Co. v. Caudill* (1901), (Ky.) 60 S. W. 180; *Savannah, etc., R. Co. v. Tiedeman & Bro.* (1897), 39 Fla. 196, 22 South. 658; *Louisville, etc., R. Co. v. Wade* (1903), 46 Fla. 197, 35 South. 963; *Northern Milling Co. v. Mackey* (1901), 99 Ill. App. 57; *Chicago, etc., R. Co. v. Mock* (1874), 72 Ill. 141. The giving of this instruction violates this rule, as its reasonable interpretation would lead the jury to believe that it was its duty to return a verdict for appellee, on a finding that his injuries were caused by any negligence of appellant, regardless of the allegations of the complaint. The giving of it was therefore error. Appellee seeks to avoid the meaning we have given this instruction by a contention that the modifying words "as alleged in the complaint" refer not only to the nature and extent of the injuries, but also to the manner of their infliction. We do not consider this contention well taken. The position of the modifying words are against such a construction. It will be observed that immediately after their use the court undertakes to tell the jury to what negligence appellee's injuries must be traceable in order to entitle him to recover in this action, and in so doing fails to limit the same to the negligence alleged in the complaint. Appellee's contention, at most, can only serve to demonstrate the confusing character of the instruction, and thus leave the giving of it error. *Summerlot*

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v. *Hamilton* (1889), 121 Ind. 87, 22 N. E. 973; *Wenning v. Teeple* (1896), 144 Ind. 189, 41 N. E. 600; *Pittsburgh, etc., R. Co. v. Noftsgar* (1897), 148 Ind. 101, 47 N. E. 332; *Masons', etc., Ins. Assn. v. Brockman* (1897), 20 Ind. App. 206, 50 N. E. 493; *Southern Ind. R. Co. v. Moore* (1901), 29 Ind. App. 52, 63 N. E. 863.

Appellant made seasonable tender of a number of instructions with a request that the court give the same, but all were refused. It bases error on such re-

3. fusal in its motion for a new trial. Among those

tendered were Nos. 15 and 35. The former was a correct instruction, as to the burden of proof on the question of contributory negligence, on the issue of damages to the automobile. The latter was a correct instruction as to the acts of negligence which the jury might consider in arriving at its verdict, expressly limiting the same to those alleged in the complaint. The rule is well settled that, where a party, in due time, tenders an instruction which fairly states the law as applied to the issues and the evidence, and the court refuses to give the same to the jury, the refusal must be held to be reversible error, unless such instruction is covered by other instructions given, or it appears that the substantial rights of such party were not prejudiced by such failure. *City of Indianapolis v. Keeley* (1906), 167 Ind. 516, 79 N. E. 499; *Baltimore, etc., R. Co. v. Peck* (1912), 53 Ind. App. 281, 101 N. E. 674; *Pryor v. Metropolitan Street R. Co.* (1900), 85 Mo. App. 367. The subject-matter of these instructions was treated by the court in Nos. 6 and 19, given by the court on its own motion, as indicated above, but in so doing the law was incorrectly stated. Such instructions were not withdrawn. We cannot say that the substantial rights of appellant were not thereby prejudiced. The refusal to give each of such instructions so requested was therefore reversible error.

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Appellant bases error on the ruling of the court in permitting the plaintiff, as a witness in his own behalf, to answer the following question over its objec-

4. tion: "Tell the jury, Mr. Sherry, what it cost to repair the automobile, if you know?" If it be conceded that the cost of repairing an automobile damaged by the negligence of another, is a proper measure of damages or an element to be considered, as the authorities in some jurisdictions hold, still such costs must be limited to making such repairs as were caused by such negligence. An inquiry on that subject must be so limited as to confine the witness to such cost in order to be competent. This question under consideration was not so limited, and hence was objectionable.

The answer given to the above question appears to be the only evidence as to the amount of damages sustained by appellee on account of the injuries to

5. his automobile, and, if properly admitted, would not sustain a finding in any amount on account of any such injuries. The answer is as follows: "I don't know what it cost to repair it, but I know there was paid out \$420 to fix it up in running order." The witness expressly states that he does not know what it cost to repair it. Thus far the answer is responsive to the question asked, and is evidently true. He, however, volunteers the statement that there was paid out \$420 to fix it up in running order, which falls far short of affording any basis in arriving at the damages sustained. While the rule for determining the amount of damages to personal property varies in some degree in different jurisdictions, and is affected by existing circumstances, it is manifest that just compensation in money, for the actual loss sustained, is the basic principle which should control. This principle is applicable to damages to automobiles as well as to other personal property. *Berry, Automobiles* (2d ed.) §547; *Cad-*

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well v. Canton (1908), 81 Conn. 288, 70 Atl. 1025; *Coffin v. Laskau* (1915), 89 Conn. 325, 94 Atl. 370, L. R. A. 1915E 959. An application of this principle makes it apparent that no part of the judgment in this action can rest on such answer. There is no way of ascertaining how much of the amount was spent to repair the damages occasioned by appellant's alleged negligence, or whether the amount so paid was a reasonable compensation for the repairs, or the relative value of the automobile when so repaired as compared with its value just prior to the damages inflicted. These are all pertinent matters where it is sought to have the cost of repairs considered as an element of damages, rather than the value of the property before and after the damage. *Berry, Automobiles* (2d ed.) §547; *Crossen v. Chicago, etc., R. Co.* (1910), 158 Ill. App. 42; *Peabody v. Lynch* (1913), 184 Ill. App. 78; *Latham v. Cleveland, etc., R. Co.* (1911), 164 Ill. App. 559; *Cadwell v. Canton, supra*; *Coffin v. Laskau, supra*; *General Fire Extinguisher Co. v. Beal-Doyle, etc., Co.* (1913), 110 Ark. 49, 160 S. W. 889, Ann. Cas. 1915D 791, and note. These matters are especially pertinent in the instant case, since the automobile in question was a second-hand machine when it was purchased by appellee about six months before the accident, and the evidence tended to show that it was not in first-class condition when damaged. We therefore conclude there was no evidence to sustain so much of the verdict as assesses damages for the injuries to the automobile.

Appellant also contends that the court erred in overruling its motion for judgment on the interrogatories and answers thereto notwithstanding the general verdict. We have examined the interrogatories and answers in the light of appellant's contention, but do not express an opinion as to its merits, as we have concluded, in view of the entire record, that the ends

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of justice will be best subserved by directing a new trial on reversing the judgment of the court below.

We note appellee's contention that appellant's statement of errors relied on, as to the overruling of its motion for a new trial, is too general to raise any question. We do not consider this contention well taken, as there seems to be a substantial compliance with the rule in that regard.

The judgment is reversed, with instructions to sustain appellant's motion for a new trial, and for such further proceedings as are not inconsistent with this opinion.

NOTE.—Reported in 116 N. E. 594.

FREE v. HOME TELEPHONE COMPANY.

[No. 9,304. Filed June 20, 1917.]

1. **NEGLIGENCE.**—*Duty of Exercising Reasonable Care.*—A charge of negligence may not be sustained except as based upon a failure to exercise reasonable care. p. 15.
2. **MASTER AND SERVANT.**—*Duty of Master.*—*Safe Place to Work.*—It is the duty of the employer to furnish to the employe a safe place within which to work, and to provide him with proper tools and equipment, a duty which includes that of making reasonable inspection and repairs and of bringing to the knowledge of the employe the existence of defects and dangers of which the employer has knowledge, actual or constructive, but which are not known to the employe, and with knowledge of which he is not chargeable, and the master's failure to discharge such duties with reasonable care is negligence. p. 15.
3. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Negligence.*—*Place of Work.*—*Failure to Inspect.*—Actionable negligence in an employer cannot be predicated on the mere failure to inspect the place of work, when inspection would disclose only what was fully known and appreciated by the servant. p. 16.
4. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Safe Place to Work.*—*Duty of Master.*—The duty of a master to furnish a reasonably safe place to work and to use ordinary care to keep it safe, is a qualified one, and does not extend to all the

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- passing risks that may arise from short-lived causes, such as arise in the ever-changing conditions of the safety of the work, or under circumstances imposing on the employe the duty to make the place safe, or where he is engaged in so doing. p. 16.
5. MASTER AND SERVANT.—*Injuries to Servant.—Perils Incident to Service.—Liability of Master.*—Where a competent person is employed to repair defects, or to demolish structures, and the perils of the service and the injury for which recovery is sought were occasioned by the nature of the work being done and which the servant was employed to do, such perils are deemed incident to the service, and there can be no recovery, since the employe assumes the risk. p. 17.
6. MASTER AND SERVANT.—*Injuries to Servant.—Duty to Warn and Instruct Servant.*—A master may be liable to a servant injured while making repairs, demolishing structures, or similar work, under the supervision and direction of a foreman or other person representing the master, or where the master withholds from the servant information respecting defects and hazards with a knowledge of which the servant is not chargeable. p. 19.
7. MASTER AND SERVANT.—*Injuries to Servant.—Master's Liability.*—Where the manager of a telephone company and overseer of its lines engaged in dismantling a telephone line under the company's orders was injured when a pole which he had climbed broke off at the ground because of its rotten condition, the company was not liable, since it was the duty of the servant, who was experienced in the work and in full charge thereof, to test any pole before he ascended it and determine its safety for himself. p. 20.
8. MASTER AND SERVANT.—*Employer's Liability Act.—Negligence.*—Negligence is the gist of all actions that may be maintained under the Employers' Liability Act (§8020a *et seq.* Burns 1914, Acts 1911 p. 145). p. 21.

From Steuben Circuit Court; *Dan M. Link*, Judge.

Action by Clem L. Free against the Home Telephone Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Mountz & Brinkerhoff and *Brown & Carlin*, for appellant.

Elmer E. Stevenson and *John G. Yeagley*, for appellee.

CALDWELL, J.—While appellant, as appellee's em-

ploye, was engaged in dismantling one of appellee's telephone lines, and specifically while endeavoring to remove a line of wire from its attachment to a certain pole which he had ascended for that purpose, the pole broke, precipitating appellant to the ground, whereby he suffered serious injuries. This action was brought by him to recover damages on account of such injuries. A trial resulted in a verdict for appellee, on which judgment was rendered and from which this appeal is prosecuted.

Appellant assigns as error the overruling of his motion for a new trial, and under such assignment challenges the sufficiency of the evidence and the correctness of certain instructions given by the court. The facts averred in the complaint essential to ascertaining its theory and to an intelligent comprehension of the questions involved are substantially as follows: Appellant was in appellee's employ as its local telephone manager at Pleasant Lake, in Steuben county. It was his duty to do general work for appellee in and about its exchange at Pleasant Lake, and on its lines extending thence into the adjacent territory, including erecting, dismantling, repairing and rebuilding telephone lines. In doing such work it was frequently necessary for appellant to climb poles supporting appellee's wires. Reasonable care on appellee's part for appellant's safety required that all telephone poles maintained by it as a part of its lines should be solid, free from decay, and sufficiently strong to bear appellant's weight safely when he was required to ascend such poles in the discharge of his duties. On February 17, 1913, appellee directed appellant to take down and remove a line of wire extending from such exchange through the village of Hudson. In said village the line of wire was attached to a pole in front of a residence, to which pole were attached also other wires connecting said ex-

change with a telephone in said residence. In performing his work as directed, it was necessary for appellant to climb to the top of such pole. In obedience to appellee's orders, he did climb to the top of such pole for the purpose of removing therefrom the line of wire which he had been directed to take down. Appellee had negligently permitted such pole to become rotten and defective and was carelessly and negligently maintaining the pole in such condition so that it was not strong enough to bear appellant's weight. While appellant was upon such pole, as aforesaid, in the line of his duty, removing the wire therefrom as directed by appellee, by reason of its defective condition the pole broke and fell, and appellant was thereby thrown to the ground and injured as specifically alleged.

It will be observed that the negligence charged consisted in permitting the pole to become rotten, weak and defective, and in maintaining it in such condition.

The facts respecting appellant's relation to the company and the transaction in which he was injured, as testified to by him, are substantially as follows: Appellant was fifty years old, and had been working for appellee for seven years as manager of the Pleasant Lake exchange. His duties included the building, rebuilding, repairing and dismantling of telephone lines, and looking after the lines connected with the Pleasant Lake exchange. There were about 200 phones connected with that exchange. Appellee's central exchange and principal office were at Angola, in connection with which there was a secretary of the company and also an overseer of lines. When lines extending from the Pleasant Lake exchange were to be built, rebuilt or dismantled, the secretary or overseer at Angola issued general orders to appellant, and he thereupon proceeded to do the work. Two or three years prior to the time when appellant was injured, appellee acquired

from a farmers' company a telephone line, thereafter designated as the "old farmers' line." This line was about five miles west of Pleasant Lake and extended a distance of three and one-half miles into and perhaps through the village of Hudson. It consisted of a single line of wire strung on native poles, such as black ash. Appellee, sometime prior to the time when appellant was injured, had abandoned the use of the line. In the village of Hudson one pole in the line, a black ash nine inches in diameter at the ground and six inches at the top and twenty-one feet high, stood in front of the residence of Mr. Fredericks, a patron of the Pleasant Lake exchange. The wires leading to his home extended from another line used by appellee a distance of about 180 feet across lots to the Fredericks phone, and were attached also to said pole. Several weeks prior to February 20, 1913, appellant received written instructions from the office at Angola to proceed to dismantle the old farmers' line. The work not having been done, the secretary of the company, on February 17, 1913, directed appellant to proceed with the work, and to take the line down before some one got hurt. Appellant, on his own initiative but with the consent of the secretary of the company, made arrangements with a Mr. Norman and a Mr. Zonker to assist in the work, they to receive the poles as compensation. Norman and Zonker were not employes of the company. Appellant, assisted by Norman and Zonker, proceeded to dismantle the old line, appellant being in charge of the work. They commenced at the end of the line remote from Hudson. In doing the work appellant testified that the poles were cut off at or near the surface of the ground. There was other evidence, and the jury so found in answer to an interrogatory that appellant in removing some of the poles broke them off at the surface of the ground by pushing against them. After about

three miles of the line had been dismantled, appellant and his two assistants, on February 20, reached the pole standing in front of the Fredericks residence. Appellant had received no specific instructions respecting this pole. As the Fredericks wire was attached to it, he tested its solidity by striking against it with his hand, and concluded that it was solid and that he would therefore not take it down. He thereupon ascended it by the use of climbers and loosened the wire which he was taking down, whereupon the pole broke and fell, throwing appellant to the ground and injuring him seriously. The pole broke at the surface of the ground because it was decayed at that point.

Appellant was overseer of the lines connected with the Pleasant Lake exchange. Appellant constructed new lines and dismantled old and useless lines only on orders from the central office, but on receiving such orders he took charge of the work and saw that the orders were carried out. His orders on this occasion were general, simply that he tear down the old farmers' line. In erecting new lines and in using old poles for that purpose, he determined their fitness, and in dismantling old lines, he determined for himself whether the poles were sound or unsound. No one on this occasion gave him any information as to whether the poles were sound, but he acted on his own judgment, after testing them by striking against them with his hand. He had had a number of years' experience in telephone line work, both with appellee and other companies. Appellee, in placing him in charge of the work of dismantling lines, did not direct him as to the manner of doing the work. He understood on this occasion that he was to take down the entire line, both wire and poles. He had had wide experience in climbing poles. He was familiar with the work of erecting new lines and of dismantling old lines. This line was being dismantled be-

cause it was old, deteriorated and useless, and the company did not need it. In climbing the pole here appellant acted on his own judgment as to its soundness. Appellant was the exclusive judge as to how to do the work he was ordered to do. He exercised his own judgment on this occasion. Poles usually decay first right at the surface of the ground. He did not examine this pole at the surface of the ground because the ground was frozen. He was superintending the work of dismantling this line. He tested this pole by striking it with his hand, pronounced it safe in his own mind, and then climbed it. It was his duty to determine for himself the question of the safety of the pole, and he was to exercise his own judgment in the work of dismantling this line. Such is appellant's own account of his relation to appellee, and of the circumstances under which he was injured. It is not materially changed or affected by the other evidence in the case. We proceed to consider the sufficiency of the evidence in its relation to the issue of negligence.

The negligence charged is that appellee permitted said pole to become decayed and defective, and maintained it in that condition as a part of the line. There is no doubt that the pole, by reason of its decayed condition, had become defective in common with other poles in the line, and that appellee permitted it to continue in that condition. It remains to be determined, however, whether actionable negligence may be predicated on such facts. A charge of negligence may not be sustained except as based upon a failure to exercise

1. reasonable care in the discharge of a duty. It is elementary that it is the duty of the employer to furnish to the employe a safe place within which
2. to work, and to provide him with proper tools and equipment with which to work. Such duty includes also the duty of making reasonable inspection

and repairs, and of bringing to the knowledge of the employe the existence of defects and dangers of which the employer has knowledge, actual or constructive, but which are not known to the employe, and with a knowledge of which he is not chargeable. A failure to discharge the duties indicated with reasonable care is negligence. Actionable negligence, however, cannot be predicated on the mere failure to inspect when

3. inspection would disclose only what was fully known and appreciated by the servant. 26 Cyc 1136. The duty to furnish a reasonably safe

4. place to work and to use ordinary care to keep it safe, is, however, a qualified duty. "It does not extend to all the passing risks that may arise from short-lived causes, or such as arise in ever-changing conditions of the safety of the work, * * * or under circumstances which impose on him (the employe) the duty of making safe or he is engaged in making safe the place where he works." *Lehigh, etc., Cement Co. v. Bass* (1913), 180 Ind. 538, 103 N. E. 483, and cases cited. 26 Cyc 1101. "It is well settled that the rule requiring the master to furnish his servant a safe place in which to work does not apply when the work of such servant consists in making safe the place and conditions of which complaint is made." *McElwaine-Richards Co. v. Wall* (1905), 166 Ind. 267, 76 N. E. 408. "A similar qualification of the master's liability is admitted where the injured servant was hired for the express purpose of assisting in the repair, demolition or alteration of some instrumentality and the unsafe conditions from which the injury resulted arose from or were incidental to the work thus undertaken by him." 3 Labatt, Master and Servant (2d ed.) §924. Thus it is held that the safe-place rule does not apply except in a qualified sense where the servant is employed to repair a dangerous place in a coal mine by taking down or

shoring up slate likely to fall (*Indiana, etc., Coal Co. v. Batey* [1904], 34 Ind. App. 16, 71 N. E. 191), or where the servant is employed to repair damaged cars and the injury is due to the fact that the cars are out of repair (*Flannagan v. Chicago, etc., R. Co.* [1880], 50 Wis. 462, 7 N. W. 337; *Brown v. Railway Co.* [1898], 59 Kan. 70, 52 Pac. 65).

In denying the right of the employe to rely on the safe-place rule as applied to a situation wherein he is injured by reason of the defects which he was employed to search out and remedy, the court in *Dartmouth, etc., Co. v. Achord* (1889), 84 Ga. 14, 10 S. E. 449, 6 L. R. A. 190, said: "The physician might as well insist on having a well patient to be treated and cured, as the machinist to have sound and safe machinery to be repaired. The plaintiff was called to this machinery as infirm, not as whole. An important part of his business was to diagnose the case and discover what was the matter." Of a similar situation, the Supreme Court in *Bedford Belt R. Co. v. Brown* (1895), 142 Ind. 659, 42 N. E. 359, said: "It is the general rule that it is a duty of the master to supply safe places and appliances for the service of his employes, but it is not understood that this duty requires the master to make a powder house a place of safety or to make railroad-ing as free from danger as hoeing corn."

A study of the foregoing cases and others cited therein will disclose that, when a competent person is employed to repair defects, or to demolish struc-

5. tures or the like, and the perils of the service and the injury for which a recovery is sought were occasioned by the nature of the work being done and which the servant was employed to do, the courts classify such perils as incident to the service and deny a recovery, for the reason, as sometimes expressed, that the

employe assumed the risk. If, however, the perils are incident to the service, the master is not chargeable with negligence and it would seem more logical to deny liability on that ground. As stated in *Bedford Belt R. Co. v. Brown, supra*: "Every service has its own peculiar hazards and the law does not hold the master accountable for such hazards as ordinarily and naturally belong to any service." On this subject the following is said in *Martin v. Des Moines, etc., Light Co.* (1906), 131 Iowa 724, 735: "If the servant brings an action against his master alleging negligence, and succeeds only in proving that the injury he has sustained was the result of some risk naturally incident to his employment, he fails to recover because he has failed to prove negligence. The very expression, 'risks naturally incident to or inherent in the employment,' exclude *ex vi termini* the idea of negligence; while 'negligence,' as applied to the master, conveys with equal certainty the idea of a risk not incident to or inherent in the employment, but arising from the failure of the master to exercise the degree of care which the law requires of him for the safety of the servant."

Of a like situation, and in commenting on the cases, the following is said in 3 Labatt, Master and Servant (2d ed.), page 2471, note: "The inability of the servant to recover is due to his failure to show any breach of duty on the master's part, and that the so-called doctrine of assumption of the ordinary risks is merely another way of expressing the fundamental principle that there can be no recovery unless there is negligence on the part of the master." See, also, *Terre Haute, etc., Traction Co. v. Young* (1913), 56 Ind. App. 25, 104 N. E. 780; *Scheurer v. Banner Co.* (1910), 28 L. R. A. (N. S.), note 1216.

A master may be liable, however, where a servant is injured while making repairs, demolishing struc-

tures, or similar work; as under some circumstances where the servant is working under the supervision and direction of a foreman or other person representing the master, or where the master withholds from the servant information in the possession of the former or with which he is chargeable respecting defects and hazards with a knowledge of which the servant is not chargeable. On this subject, see 3 Labatt, Master and Servant (2d ed.) 2472 *et seq.*; *Hulse v. Home Telephone Co.* (1912), 164 Mo. App. 126, 147 S. W. 1124; *Clark v. Telephone Co.* (1910), 146 Iowa 428, 123 N. W. 327. The distinction is recognized in *Corby v. Telephone Co.* (1910), 231 Mo. 417, 132 S. W. 712, as follows: "Nor would the master be liable for damages for injuries sustained by the so-called servant in consequence of the unsafe place furnished him in which to labor, where the servant is employed not only to repair the defects and make the place safe, but also to manage and control those repairs while they are being made, for the obvious reason that in such case the servant is employed because of his superior knowledge and experience in such matters, and, consequently, acts both for himself and for the master." * * *

"Of course, as before suggested, where two or three linemen are sent out on an equal footing along a telephone line to inspect and make such repairs of defects in the poles and wires as they may discover, or which may have been pointed out to them, the master would not be liable to any one of them for injuries sustained in consequence of said defects for the obvious reason that they would be representing both the company and themselves in such matters, and would be executing the work according to their own plans, knowledge and judgment, and not under the supervision, orders and directions of a foreman representing the master. In

such a case, strictly speaking, the relation of master and servant does not exist—the so-called servant, while he is an employe, being his own boss and not under the charge of nor subject to the orders or control of the employer, nor has he the right to assume that the employer will inspect the premises or that the place to be furnished him in which to work will be reasonably safe, for the reason that he was employed for the express purpose of making the inspection and repairing all defects discovered by him or pointed out by others." See, also, 26 Cyc 1105, 1106.

We proceed to apply the foregoing principles to the facts of this case: Appellant received general orders to dismantle the old farmers' line because it had

7. been abandoned and because it was deteriorated, useless and was likely to fall and injure someone.

He understood that the poles were no longer fit to be used in a telephone line, as indicated by the fact that he arranged with his assistants that they should have the poles in consideration of their services in wrecking the line. Appellant was experienced in the work and was in full charge. When engaged in such work as on this occasion, he determined for himself whether a pole was sound or unsound, and acted on his own judgment. He was the exclusive judge as to how to do the work and as to the best manner of accomplishing it. It was his duty under his employment to test any pole before he ascended it and determine its safety for himself. Such in brief are the facts as testified to by appellant, and we fail to discover wherein under such facts the charge of negligence may be sustained. While it is true that the pole in question in common with other poles in the line had become weak and deteriorated and appellee had permitted such poles to continue in its line in such condition, yet appellant was directed to remove the consequent peril by wrecking the line. It was appellee's

duty to its employes and to the public, in order that it might escape a possible liability for actionable negligence in some other relation, to remove the peril by repairing or wrecking the line. As the line was not needed, appellee chose to do the latter, and appellant with full knowledge of the situation and of appellee's purpose undertook to execute them. The Fredericks pole was a pole in the line. Appellant on his own motion determined to let it stand. He had received no instructions to that effect and no specific representations had been made to him respecting its condition. It was in a line over which he had charge as overseer. There is nothing to indicate that the company through any other representative had any knowledge or means of knowledge of this particular pole superior to that of appellant. We conclude that the evidence is not only sufficient to sustain the verdict, but also that no reasonable inference of negligence may be deduced from it.

Something is said in the briefs on the subject of whether this action was brought under the Employers'

Liability Act, §8020a *et seq.* Burns 1914, Acts

8. 1911 p. 145. We regard that question as unimportant here, as negligence is the gist of all actions that may be maintained under that act. *Vandalia R. Co. v. Stillwell* (1913), 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D 258.

Certain instructions that deal with the question of contributory negligence and also with assumed risks are assailed as erroneous. The instructions as a whole in their relation to the former question cannot be approved. The errors, if any, however, were of such a nature as to have no bearing in determining the issue of negligence charged against appellant. On the issue of negligence the jury was correctly charged. We are required to affirm the judgment on the evidence. In addition to cases cited, see *Adams v. Central Ind. R.*

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Co. (1906), 38 Ind. App. 607, 78 N. E. 687; *Neagle v. Syracuse, etc., R. Co.* (1906), 185 N. Y. 270, 77 N. E. 1064, 25 L. R. A. (N. S.) 321, and note; *McGorty v. Southern, etc., Telephone Co.* (1897), 69 Conn. 635, 38 Atl. 359, 61 Am. St. 62; *Griffin v. New York Telephone Co.* (1910), 141 App. Div. 1, 125 N. Y. Supp. 642; *LaDuke v. Hudson River Telephone Co.* (1909), 136 App. Div. 136, 120 N. Y. Supp. 171.

Judgment affirmed.

NOTE.—Reported in 116 N. E. 600. Master and servant: liability of master for injuries received by servant in felling tree or pulling down other object, 20 Ann. Cas. 249; injuries to servant, failure to inspect, 26 Cyc 1139; warning and instructing servant, 26 Cyc 1165.

TRELOAR ET AL. v. HARRIS.

[No. 9,793. Filed June 20, 1917.]

1. **NEW TRIAL.**—*Motion.*—*Waiver by Filing Motion in Arrest of Judgment.*—A motion in arrest of judgment filed before the motion for a new trial waives the latter, hence a motion for a new trial filed after a motion in arrest of judgment is of no effect and presents no question for consideration on appeal. p. 23.
2. **APPEAL.**—*Extending Time for Appeal.*—*Motion for New Trial.*—Appellant's motion for a new trial, waived because filed subsequently to their motion in arrest of judgment, did not extend the time for perfecting the appeal. p. 23.

From Clark Circuit Court; *John M. Paris*, Special Judge.

Action by James Harris against Henry Treloar and another. From a judgment for plaintiff, the defendants appeal. *Appeal dismissed.*

H. Willard Phipps and *Burdette C. Lutz*, for appellants.

George C. Kopp and *L. A. Douglass*, for appellee.

IBACH, P. J.—Appellee moves to dismiss this appeal

on the grounds that the appeal herein was not taken within 180 days from the rendition of the judgment appealed from, and that notice of appeal was not given within ninety days after the transcript was filed in this court. The record discloses the following: The judgment appealed from was rendered on March 16, 1916. On March 30, 1916, appellants filed their joint motion in arrest of judgment, and on April 15, 1916, their separate motions for a new trial. On April 24, 1916, the motion in arrest was overruled and on April 28, 1916, their separate motions for a new trial were overruled. The transcript and assignment of errors were not filed in this court until October 26, 1916.

It is a settled rule of practice in this state, with certain exceptions not applicable here, that a motion in arrest of judgment filed before the motion for

1. a new trial waives the latter. *Cincinnati, etc., R. Co. v. Case* (1890), 122 Ind. 310, 316, 23 N. E. 797, and cases cited; *Yazel v. State* (1908), 170 Ind. 535, 539, 540, 84 N. E. 972, and cases cited; *Kelley v. Bell* (1909), 172 Ind. 590, 595, 596, 88 N. E. 58. The filing of the motion for a new trial, after the filing of the motion in arrest, was the same as if no motion for a new trial had been filed; and it presents no question.

It has been held by this court that a motion for a new trial filed after the specified time is not good even for the purpose of extending the time for the bring-

2. ing of an appeal. *Blose v. Myers* (1914), 58 Ind. App. 34, 107 N. E. 548. By analogy, appellants' motions for a new trial in this case could not have the effect of extending the time for filing this appeal, and the 180 days commenced to run from the date of the rendition of the judgment, which date we have indicated was on March 16, 1916.

In any event the transcript was not filed in this court until the 181st day after the overruling of appellants'

motions for new trial, and therefore beyond the time allowed by statute for bringing an appeal. Appeal dismissed.

NOTE.—Reported in 116 N. E. 590.

TENNANT v. HULET.

[No. 9,326. Filed June 20, 1917.]

1. **LIMITATION OF ACTIONS.—Foreclosure of Mortgage.—Effect of Bar.**—A mortgage given for the sole purpose of securing the payment of a debt is but an incident to the debt which it secures, and when the debt has been barred, by statute of limitations or otherwise, the mortgage lien ceases to be effective. p. 31.
2. **LIMITATION OF ACTIONS.—Notes and Mortgages.—Action.—When Barred.—Statutes.**—Section 295, cl. 5, Burns 1914, §38 Acts 1881 [s. s.] p. 240, providing that actions upon promissory notes, bills of exchange, or other written contracts for the payment of money shall be commenced within ten years, is controlling in an action on a note and mortgage, although the promise to pay is incorporated in the mortgage, the mortgage being merely an incident of the debt. p. 34.
3. **LIMITATION OF ACTIONS.—Bar of Debt.—Effect on Security.—Statutes.**—The provisions of §§308a, 308b Burns 1914, Acts 1909 p. 334, that no action shall be brought or maintained to foreclose or enforce the lien of any mortgage on real estate when the last installment of the debt secured by such mortgage, as shown by the record thereof, has been due more than twenty years, and that the lien of all such mortgages shall cease and expire twenty years from such time, or, if the record does not show when the debt secured becomes due, then no action shall be brought after twenty years from the date of the mortgage, and the lien of such mortgage shall cease and expire twenty years from such date, do not show an intention on the part of the legislature to extend the time when an action may be brought to foreclose a mortgage which is given merely to secure a debt beyond the time when an action can be brought on the debt thus secured, but such statute was intended to be one of repose, limiting the remedy of the mortgagee. p. 35.
4. **LIMITATION OF ACTIONS.—Statute.—Operation.**—Where a cause of action on a note and mortgage had been barred by the statute of limitations before the enactment of §§308a, 308b Burns 1914, Acts 1909 p. 334, limiting the time within which

suit may be brought to foreclose to twenty years, the passage of such sections cannot renew or give new life to the cause of action. p. 37.

From Montgomery Circuit Court; *Jere West*, Judge.

Action by Walter F. Hulet against Flora M. Tennant. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Clyde H. Jones, Henry D. Van Cleave and Arthur McGaughey, for appellant.

Finley P. Mount and Chase Harding, for appellee.

HOTTEL, C. J.—Appellee, as assignee of the note and mortgage herein sued on, filed in the trial court a complaint in three paragraphs. The first paragraph is based on the note and mortgage, and by it appellee sought to obtain a personal judgment against appellant for the amount due on the note and a foreclosure of the mortgage given to secure such note. The second paragraph is based on the promise to pay contained in the mortgage, and asks for a personal judgment for the amount due by reason of such promise and a foreclosure of the mortgage given to secure the debt evidenced thereby. The third paragraph is based on the promise to pay contained in the mortgage and seeks to enforce the lien on the mortgaged premises, and to have the mortgage foreclosed to satisfy the same, but asks no personal judgment.

Appellant filed an answer in four paragraphs. The first paragraph is a general denial, the second is the ten-year statute of limitation, the third the fifteen-year statute of limitation, and the fourth paragraph avers that the note and mortgage were executed by appellant as surety at a time when she was a married woman.

A demurrer was filed to said second, third and fourth paragraphs of answer, and the court overruled such demurrer to each of said answers, to the second and third

paragraphs of complaint, and sustained the demurrer to the second and third paragraphs of answer to the third paragraph of complaint. The latter ruling—that is, the ruling sustaining the demurrer to the second and third paragraphs of answer to the third paragraph of complaint—is assigned as error and relied on for reversal. Some objections are made to the form of said demurrer, it being contended by appellant that it “is not so drawn as to raise any question as to the sufficiency of the facts in said second and third paragraphs of answer to constitute a defense to the third paragraph of complaint,” but our determination of the question presented by the ruling on such demurrer on its merits makes unnecessary the consideration or disposition of said preliminary question.

We are not quite sure that we understand appellee’s position in this court as to the theory of the cause of action stated in said third paragraph of his complaint. He insists that it is not an action for a personal judgment on the promise to pay contained in the mortgage; and he also says in effect that he desires to impress upon the court that “the third paragraph of complaint upon which the judgment was rendered is not brought to foreclose a mortgage.” The averments and the prayer of this paragraph do not justify the latter contention. On the contrary, appellee in his prayer in this paragraph expressly “demands judgment determining the amount of his said debt and for foreclosure of said mortgage and a decree ordering the land sold and the proceeds applied to the satisfaction of said debt, and barring the right of defendant and all persons claiming by, through or under her as against said mortgage and said lands and that out of the proceeds of such foreclosure plaintiff’s debt and all costs herein be paid.”

It is manifest from the general finding and judgment of the trial court that it treated said third paragraph

as stating a cause of action based on the promise to pay in such mortgage and the lien on the land therein given to secure such payment, because the court finds that there is due appellee on the debt sued on in such paragraph the sum of \$295.50; that said debt is secured by mortgage on real estate described, etc.; that such mortgage is a lien upon said real estate to the extent of said indebtedness, and that appellee is entitled to have the lien foreclosed as against appellant.

Upon such finding there is judgment as follows: "It is therefore ordered, adjudged and decreed by the court that there is due the plaintiff on his debt and mortgage, sued upon herein in the third paragraph of complaint herein, the sum of two hundred ninety-five dollars and fifty cents (\$295.50), of which amount the sum of twenty-six dollars and eighty cents (\$26.80) is for the plaintiff's attorney's fees. All collectible without any relief from valuation and appraisement laws.

"It is further ordered, adjudged and decreed by the court that the equity of redemption of the defendant and of all other persons claiming from, by, through or under the said defendant, be, and the same is hereby forever barred and *foreclosed*. * * * Said sale to be made without relief from valuation or appraisement laws. And the proceeds derived from such sale the sheriff is directed to apply in the manner following, to-wit:—First: To the payment of the costs of this proceeding and the costs of sale. Second:—To the payment of the plaintiff's claims, principal, interest and attorney's fees. And the overplus, if any, remaining after the payment of the above judgment, principal, interest, costs and attorney's fees, shall be paid by said sheriff to the clerk of this court for the use and benefit of the party or parties legally entitled thereto."

If said paragraph of complaint were merely an action to declare the lien, it was an idle ceremony, seek-

ing merely the declaration of a right with no means for its enforcement.

Following his statement, *supra*, that said paragraph of complaint is not brought to foreclose a mortgage, appellee says further: "No personal judgment is sought or obtained. The promise of Mrs. Tennant to pay the debt is not sought to be enforced. Her obligation to submit her land to sale to satisfy plaintiff's debt is what is relied on. Her promise in the mortgage to pay the debt makes the instrument a separate and complete contract and therefore enforceable aside from the note but we do not ask her to fulfill that promise to pay the debt. We repeat, we do not ask her and the judgment does not require her to pay or carry out any written contract whereby she is to pay money."

We assume that the language quoted presents the key to appellee's real contention as to the theory of said paragraph of complaint, and we may add that we think that this was the theory adopted by the trial court, and from this viewpoint we shall consider the sufficiency of said second and third paragraphs of answer to said third paragraph of complaint. This requires us to determine which of the periods of limitation fixed by statute controls the cause of action stated in the third paragraph of complaint.

The sections of the statute and provisions of the periods of limitation cited and relied on by the parties as applicable to such cause of action are as follows: Section 295 Burns 1914 (§38, Acts 1881 [s.s.] p. 240. In force September 19, 1881): "The following actions shall be commenced within the periods herein prescribed, after the cause of action has accrued, and not afterward: * * * *Fifth.* Upon promissory notes, bills of exchange and other written contracts for the payment of money, hereafter executed, within ten years. * * * *Sixth.* Upon contracts in writing

other than those for the payment of money, on judgments of courts of record, and for the recovery of the possession of real estate, within twenty years."

Section 296 Burns 1914 (§39, *supra*): "All actions not limited by any other statute shall be brought within fifteen years. In special cases, where a different limitation is prescribed by statute, the provision of this act shall not apply."

Section 308a Burns 1914 (§1, Acts 1909 p. 334. In force April 5, 1909): "That no action shall be brought or maintained to foreclose or enforce the lien of any mortgage on real estate in this state when the last installment of the debt secured by such mortgage as shown by the record thereof has been due more than twenty years. If the record of any mortgage does not show when the debt thereby secured becomes due, then no action shall thereafter be brought or maintained to foreclose or enforce the lien of such mortgage after twenty years from the date of such mortgage."

Section 308b Burns 1914 (§2, *supra*): "The lien of all mortgages upon real estate in this state shall cease and expire twenty years from the time the last installment of the debt secured by such mortgage becomes due as shown by the record thereof. If the record of such mortgage does not show when the debt thereby secured becomes due, the lien of such mortgage upon the real estate therein described shall cease and expire twenty years from the date of such mortgage."

Appellee, in effect, concedes that the fifth subdivision, of §295, *supra*, controls the debt evidenced by the note, but insists that, where the promise to pay appears in the mortgage, such mortgage or the lien therein created is not a mere incident of the debt or a contract in writing "for the payment of money" within the meaning of the fifth subdivision of §295, *supra*, but that the contract in the mortgage creating such lien is an in-

dependent contract in writing "other than for the payment of money," to which the sixth subdivision of §295, *supra*, is applicable. In support of this contention, appellee relies upon and cites the following cases. *Lilly v. Dunn* (1884), 96 Ind. 220; *Munroe v. Stanley* (1915), 220 Mass. 438, 107 N. E. 1012; *Aetna Life Ins. Co. v. Finch* (1882), 84 Ind. 301; *Bridges v. Blake* (1886), 106 Ind. 332, 6 N. E. 833; *Post v. Losey* (1887), 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *Crawford v. Hazelrigg* (1889), 117 Ind. 63, 18 N. E. 603; *Nichol v. Henry* (1884), 98 Ind. 34; *Catterlin v. Armstrong* (1881), 79 Ind. 514; *Id.* (1885), 101 Ind. 258; *Swatts v. Bowen* (1895), 141 Ind. 322, 40 N. E. 1057; *Leonard v. Binford* (1890), 122 Ind. 200, 23 N. E. 704; *Chicago, etc., R. Co. v. McEwen* (1904), 35 Ind. App. 251, 71 N. E. 926; *Hyatt v. Mattingly* (1879), 68 Ind. 271.

An examination of the cases decided by the courts of this state discloses that they do not support appellant's contention. The mortgage involved in each of these cases was executed prior to 1881 and hence was not controlled by the statute, *supra*, which went in force September 19, 1881. §295, cl. 5, Burns 1914, *supra*; *Bradley v. Spain* (1893), 7 Ind. App. 694, 34 N. E. 1011. The statute governing such cases was that of 1852, which provided that actions on accounts and contracts not in writing should be commenced within six years after the cause of action had accrued, and that actions upon contracts in writing should be commenced within twenty years after the cause of action had accrued. Act of June 18, 1852, §§210, 211, 2 R. S. 1876 p. 121.

The most that any of said cases can be said to hold favorable to appellee's contention is that though the mortgage involved in the particular case might have been barred in less than twenty years, and when the debt which it secured was barred, but for the express

promise to pay contained in such mortgage, yet such promise was a contract in writing which was not barred until twenty years after the accrual of the cause of action. That statute (2 R. S. 1876 p. 121, *supra*) made no distinction, as does the statute now in force (§295, *supra*), between contracts in writing for the payment of money, and contracts in writing other than for the payment of money; and hence such cases are not authority for appellee's contention.

The mortgage in this case, a copy of which is made part of said third paragraph of complaint, provides as follows:

"This Indenture Witnesseth, That Flora M. Tennant in her own right * * * Mortgage and Warrant to John W. Krause * * * the following described real estate, (describing it).

"Said mortgage is made to secure a certain note executed on April 1st, 1895 by said Flora M. Tennant for the sum of one hundred twenty-four 70-100 Dollars, payable to J. W. Krause, due 1st day of August, 1895, bearing 6 per cent. interest from date and signed by said Flora M. Tennant, and the mortgagors expressly agree to pay the sum of money above secured without relief from Valuation Laws."

It is plain that the mortgage purports to have been executed for the sole purpose of securing the payment

of the debt evidenced by the note mentioned

1. therein, and, though contrary to the rule prevailing in many other jurisdictions, the courts of this state have uniformly held that such a mortgage is but an incident to the debt, and that when the debt has been barred, by statute of limitations or otherwise, the mortgage also is barred. Upon this question, the Supreme Court, in the case of *Lilly v. Dunn*, *supra*, one of the cases relied on by appellee, at pages 224, and 225, said: "The general rule may be said to be that the lien created by the mortgage may be enforced, al-

though the debt which the mortgage was given to secure has been barred by the statute of limitations. This rule is recognized in many, if not most, of the states, upon the theory that statutes of limitations are applicable only to proceedings in the courts of law, and hence not to suits in chancery. * * *

"In some of the states, however, the statutes limit suits in equity in the same manner as actions at law, and in those states the mortgage is held to be in effect extinguished when the mortgage debt is barred." The court then quotes from the case of *Lord v. Morris*, 18 Cal. 482, in part as follows: "We do not question the correctness of the general doctrine prevailing in the courts of several of the states, that a mortgage remains in force until the debt, for the security of which it is given, is paid. We only hold that the doctrine has no application under the statute of limitations of this state. * * * Here a mortgage is regarded as between the parties, as well as with reference to the rights of the mortgagor in his dealings with third persons, as a mere security, creating a lien or charge upon the property, and not as a conveyance vesting any estate in the premises, either before or after condition broken. Here it confers no right to the possession of the premises either before or after default, and, of course, furnishes no support to the action of ejectment, or to a writ of entry for their recovery. The language of the statute is express, that it shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without a foreclosure and sale. * * * Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject-matter and not to the form of the action, or to the forum in which the action is prosecuted."

The Supreme Court then said of the California case

quoted from that the conclusion there reached was that when "the debt is barred by the statute of limitations, the mortgage being the incident merely is also barred, or, at least, rendered unavailable for any practical purpose," and announced the rules which govern in this state as follows: "It is well settled in this state that a mortgage upon real estate constitutes only a lien upon the land as a security for the debt it is given to secure, the legal title still remaining in the mortgagor, subject to the lien. *Jones Mort.*, section 28; *Fletcher v. Holmes*, 32 Ind. 497; *Favorite v. Deardorff*, 84 Ind. 555.

"It is equally well settled that in this state the debt is the principal thing and the mortgage only the incident. *Hubbard v. Harrison*, 38 Ind. 323; *Gabbert v. Schwartz*, 69 Ind. 450.

"As we have but one form of action in civil cases, our statute of limitations is applicable to all demands, whether legal or equitable, for the recovery of money. It is directed to the subject-matter, and bars all claims according to the general class to which they respectively belong. It has also been held by this court that a mortgage is inoperative when the debt is void or has been discharged. *Sherman v. Sherman*, 3 Ind. 337; *State v. State Bank*, 5 Ind. 353; *Ledyard v. Chapin*, 6 Ind. 320; *Brisk v. Scott*, 47 Ind. 279; *Tate v. Fletcher*, 77 Ind. 102; *Bowman v. Mitchell*, 79 Ind. 84.

"It follows that the rules of construction enunciated in the case of *Lord v. Morris*, *supra*, are fully applicable to the enforcement of mortgage liens in this state, carrying us to the inevitable extent of holding that when the mortgage debt becomes barred the mortgage lien ceases to be effective." To the same effect are the cases following: *Aetna Life Ins. Co. v. Finch*, *supra*; *Bridges v. Blake*, *supra*; *Post v. Losey*, *supra*; *Crawford v. Hazelrigg*, *supra*; *Nichol v. Henry*, *supra*; *Catterlin v.*

Armstrong, supra (79 Ind. 514; 101 Ind. 258); *Daugherty v. Wheeler* (1890), 125 Ind. 421, 25 N. E. 542; *Cassell v. Lowry* (1904), 164 Ind. 1, 4, 72 N. E. 640; *Bottles v. Miller* (1887), 112 Ind. 584, 591, 14 N. E. 728; *Swatts v. Bowen, supra*, *Leonard v. Binford, supra*; *Tate v. Fletcher, supra*; *Bowman v. Mitchell, supra*; *Duty v. Graham* (1854), 12 Tex. 427, 62 Am. Dec. 534; *Ross v. Mitchell* (1866), 28 Tex. 150; *Kyger v. Ryley* (1873), 2 Neb. 20; *Peters v. Dunnells* (1877), 5 Neb. 460; *Newman v. DeLorimer* (1865), 19 Ia. 244, 247; *Cower v. Winchester* (1871), 33 Ia. 303.

It is true that, in the case just quoted from, the court said that its conclusion rested upon the assumption that

the mortgage did not contain an express provision to pay the mortgage debt. This statement was proper in view of the facts of the case under consideration and the statute then in force, as is developed by what follows in the opinion, because in that case, there being no promise to pay in the mortgage, there was no promise in writing, and hence the six-year statute of limitations was applicable; whereas, if there had been a promise in the mortgage, the twenty-year statute would have been applicable. In the instant case, however, the promise to pay, whether in the note, or in the mortgage given to secure the debt evidenced by such note or mortgage, is controlled by the same statute. Such promise is, in either event, a promise in writing, and hence a promise in writing for the payment of money to which the fifth subdivision of §295, *supra*, is applicable.

The mere fact that the promise to pay is incorporated in the mortgage given to secure the debt evidenced by such promise does not change the character of the combined instrument, the mortgage, from that of the two separate instruments, the note and the mortgage, in the

sense that the former is robbed of its character of a promise in writing to pay money; nor is such mortgage thereby changed from a mere lien to secure the payment of the debt evidenced by such promise to a conveyance vesting any estate in the premises so mortgaged, and such is not the effect of any of the cases cited *supra*. On the contrary, as before indicated, they merely hold that the written promise incorporated in the mortgage made the promise to pay the debt, evidenced by such written promise, a contract in writing, to which the twenty-year statute of limitations was applicable, rather than a verbal promise, controlled by the six-year statute of limitations.

Appellant also contends that under §§308a and 308b Burns 1914, *supra*, the right to enforce the lien created by such mortgage is not barred until twenty

3. years after the last installment of the debt secured by it becomes due. Counsel have cited no case in which these sections of statute have been construed, and we have been unable to find such a case. We think, however, that the purpose and intent of the legislature in passing them is manifest from their language. They provide that no action shall be brought or maintained to foreclose or enforce the lien of any mortgage on real estate in this state when the last installment of the debt secured by such mortgage, as shown by the record thereof, has been due more than twenty years, and that the lien of all such mortgages shall cease and expire twenty years from such time, or, if the record does not show when the debt secured becomes due, then no action shall be brought or maintained after twenty years from the date of the mortgage, and the lien of such mortgages shall cease and expire twenty years from such date. We do not think that the legislature, in thus fixing a time beyond which no lien can be enforced, and after which such lien shall

cease and expire, showed an intention to extend the time when an action may be brought to foreclose a mortgage which was given merely to secure a debt beyond the time when an action can be brought on the debt thus secured.

We think that the legislature intended, by said sections, to enact a statute of repose, limiting the *remedy* of the mortgagee, and also to bar his *right* in the mortgage lien, after a period to be ascertained by reference to the mortgage record. This conclusion necessarily follows from the provision of §308b, *supra*, that the lien of such mortgages "shall cease and expire twenty years from the time the last installment of the debt secured by such mortgage becomes due," etc.

Sections 308a and 308b, *supra*, can be, and in our judgment should be, construed in harmony with the rule above referred to, viz., that the barring of the debt bars the right of foreclosure. For instance, if a mortgage, containing no express promise to pay, were given merely to secure the payment of a debt evidenced by a note, the debt, and hence the mortgage, would be barred after ten years from the time the debt was due. *Lilly v. Dunn*, *supra*. The mortgagor, however, as to such debt, by making payments on the note, might toll the statute of limitations indefinitely. *MacMillen v. Clements* (1903), 33 Ind. App. 120, 123, 70 N. E. 997; *Willette v. Gifford* (1910), 46 Ind. App. 185, 190, 92 N. E. 186; *Bottles v. Miller*, *supra*. But under §§308a, 308b, *supra*, he could not thus extend the time when an action could be brought to foreclose, beyond twenty years from the time the last instalment of the debt, *as shown by the record of the mortgage*, became due, or, if the record does not show when such instalment became due, after twenty years from the date of the mortgage.

As affecting this phase of appellee's contention, we

might add that §§308a, 308b, *supra*, did not go in force until April 5, 1909. It affirmatively ap-

4. pears from the averments of said third paragraph of complaint that the mortgage upon which such paragraph is based was executed by appellant to cover a liability for certain shrubbery, berry bushes, and fruit trees sold and delivered to her; that such goods were so sold and delivered, and said mortgage executed on April 1, 1895; that the only payments made thereon were two payments aggregating \$4.50 made on August 2, 1895. It thus affirmatively appears from said paragraph of complaint that more than ten years had expired between the time when the cause of action stated therein accrued and the passage of said §§308a, 308b; and hence, under the authorities before cited herein, appellee's said cause of action was barred before said sections were in force or enacted. The cause of action having been barred before the passage of said sections, their passage could not have the effect of renewing or giving new life to the cause of action. *McKinney v. Springer* (1847), 8 Blkf. 506; *Stipp v. Brown* (1851), 2 Ind. 647; *Right v. Martin* (1858), 11 Ind. 123; *Roush v. Morrison* (1874), 47 Ind. 414; *Morrison v. Kendall* (1893), 6 Ind. App. 212, 33 N. E. 370.

It follows from what we have said that the statute of limitations applicable to said third paragraph of complaint is the ten-year statute provided by the fifth subdivision of §295, *supra*, and that the trial court erred in sustaining a demurrer to appellant's second paragraph of answer to said third paragraph of complaint. Of course, the cause of action being one to which the ten-year statute of limitations is applicable, it would be barred in the fifteen years set up in the third paragraph of answer. The overruling of the demurrer to the second paragraph of answer however will give ap-

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pellant the advantage of the statute to which she is entitled, and render unnecessary her third paragraph of answer.

For the reasons indicated, the judgment below is reversed, with instructions to the trial court to overrule the demurrer to said second paragraph of answer to the third paragraph of complaint, and for such other proceedings as are consistent with this opinion.

NOTE.—Reported in 116 N. E. 748. Limitation of actions: note barred by statute, effect on mortgage, 60 Am. St. 201, 25 Cyc 1001.

PINKUS v. THE PITTSBURGH, CINCINNATI, CHICAGO
AND ST. LOUIS RAILWAY COMPANY ET AL.

[No. 9,090. Filed November 9, 1916. Rehearing denied April 20, 1917. Transfer denied June 20, 1917.]

1. *APPEAL.—Briefs.—Sufficiency.—Waiver of Error.*—Where appellant's briefs set forth a mere abstract proposition of law which is not applied to a question sought to be raised, the question is waived. p. 41.
2. *APPEAL.—Review.—Presumption.*—A ruling of the trial court is presumed to be correct until the contrary is affirmatively shown. p. 41.
3. *APPEAL.—Review.—Harmless Error.—Directing Verdict.*—In a passenger's action against a railway company and a sleeping car company for the loss of jewelry through the negligence of the sleeping car company, error, if any, in directing a verdict in favor of the railway company was harmless to plaintiff where the jury by its verdict exonerated the sleeping car company from negligence, since the sleeping car company, the railroad's servant, being free from negligence, the master could not have been found negligent. p. 43.
4. *CARRIERS.—Carriage of Passengers.—Passenger's Effects.—Conversion.—Sufficiency of Evidence.—Delivery to Carrier.*—Where a passenger on a sleeping car did not part with the possession of a box containing jewelry, but merely placed it, with the knowledge of the carrier's servants, in an upper berth above the one occupied by herself, the carrier was not liable for conversion for loss of the jewelry. p. 44.
5. *CARRIERS.—Carriage of Passengers.—Transportation of Passenger's Personal Effects.—Duty of Carrier.*—Where a pas-

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senger's ordinary personal effects are retained in his possession, the carrier is not an insurer of their safety, but is liable only for loss occasioned by failure to exercise reasonable care and caution to protect the same from loss or injury. p. 46.

6. *CARRIERS.—Carriage of Passengers.—Transportation of Passenger's Personal Effects and Money.—Duty of Carrier.*—When a passenger, without the knowledge of the carrier, has in his possession and control large sums of money or other property of exceptional value, the carrier is not liable for loss or injury thereto, as the carrier, under its contract of carriage, assumes no obligation as to articles of property which form no part of the passenger's ordinary luggage or personal effects. p. 46.
7. *APPEAL.—Review.—Harmless Error.—Argument of Counsel.—Reading from Document Not in Evidence.*—The fact that counsel in argument, over objection, read questions to and answers by the opposing party on cross-examination from an examination taken out of court before trial, and commented upon the same, was not prejudicial error, although the examination itself was not put in evidence, where the identical questions and answers referred to by counsel had gone into the record on cross-examination of the party at the trial. p. 48.
8. *APPEAL.—Review.—Harmless Error.—Limiting Argument of Counsel.*—In a passenger's action against a carrier to recover for the loss of personal effects, it was not prejudicial to plaintiff to refuse her counsel permission to discuss the law relative to the validity of a provision in a passenger's check issued by defendant that "property taken into car will be entirely at owner's risk," where counsel was informed that he could read the instructions of the court as the law of the case and apply it to the facts, such instructions, although not referring specifically to the check or its contents, having correctly stated defendant's liability for the loss of the passenger's effects. p. 48.

From Marion Circuit Court (22,440) ; *Charles Rems-ter*, Judge.

Action by Leah G. Pinkus against The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company and another. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

L. E. Ritchey, for appellant.

MORAN, J.—On February 1, 1913, appellant and her husband took passage at Indianapolis on a Pullman car

sleeper reserved for Jacksonville, Florida, enroute to the Panama Canal. The car was owned and in charge of the servants of appellee The Pullman Company to be transported over appellee The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company's line of railroad. Upon reaching Louisville, Kentucky, in the course of her journey, appellant discovered that a small box and its contents, consisting of four rings and a lavalier, all set with diamonds, which appellant carried with her as a part of her luggage, and of the probable value of \$5,000, were missing. This action was instituted to recover the value thereof. The complaint as filed was in three paragraphs; the first was upon the theory that appellant purchased transportation and Pullman accommodations for a direct and continuous trip from Indianapolis, Indiana, to Jacksonville, Florida, in the Pullman car; and on account of the negligence of appellees, appellant and her husband were compelled to hastily leave the train and Pullman car at Louisville, Kentucky, and by reason of the negligence of appellees in not carrying appellant to her destination, as agreed, appellant was compelled under stress of haste and excitement to leave the car and prevented from removing her jewelry therefrom. The theory of the second paragraph is that the jewelry was removed and stolen from an upper berth in the car, where it was placed with the assistance and knowledge of the porter of the Pullman car, through the negligence of the servants in charge of the car in failing to keep the proper watch and to exercise due care of appellant's property. The third paragraph charges appellees with the conversion of the jewelry. An issue of fact was joined as to each paragraph of complaint by an answer of general denial being addressed thereto and, upon submission of the issues thus joined to a jury for trial, a verdict was returned for appellee The Pullman Company. From a judgment on

the verdict appellant seeks a review thereof, assigning as error the overruling of her motion for a new trial.

The court on its own motion, after the close of the argument of counsel, and by an instruction, withdrew from the consideration of the jury the first para-

1. graph of complaint, and directed a verdict in favor of appellee The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. Appellant in her brief under points and authorities seeks to question the action of the court in withdrawing from the consideration of the jury the first paragraph of complaint, in the following manner: "Where there is some evidence in support of one or more paragraphs of complaint, an instruction given to the jury as above is erroneous." This as an abstract proposition of law may well be conceded, but there is no attempt to apply it to the question sought to be raised, nor has our attention been directed to any evidence in support of the same. It is therefore waived. Further, it must be presumed that there

was no evidence supporting the issue joined as

2. to the first paragraph of complaint, as the ruling of the trial court must be regarded as correct until it affirmatively appears to the contrary. Elliott, App. Proc. §710.

As to the giving of the instruction directing a verdict in favor of appellee The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, appellant presents the same for our consideration under her motion for a new trial, having properly excepted to the giving thereof.

The complaint alleges that both appellees are separate corporations, and upon trial of the cause it was agreed by the parties that appellee The Pullman Company was the owner of the car upon which appellant took passage, and that the car was in charge of the employes of this company. It has been held upon good authority that: "A railroad company is not relieved from liability for

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the loss of the baggage of a passenger upon its train by the fact that, at the time of loss, he occupied space in the sleeping car, which belonged to another company, if the car was in fact a part of the train, and was employed by it in performing its contract of transportation, for the agents and servants of the sleeping car company are regarded by the law as agents of the railroad company for the purposes of the contract for transportation, and the law will not permit a railroad company through any device or arrangement with the sleeping car company whose cars constitute a part of its train to escape the liability incurred by its contract." 5 R. C. L. 183; *Kinsley v. Lake Shore, etc., R. Co.* (1878), 125 Mass. 54, 28 Am. Rep. 200; *Nelson v. Railroad Co.* (1910), 98 Miss. 295, 53 South. 619, 31 L. R. A. (N. S.) 689; *Railroad Co. v. Katzenberger* (1886), 16 Lea (Tenn.) 380, 1 S. W. 44, 57 Am. Rep. 232; *Calder v. Southern Railway* (1911), 89 S. C. 287, 71 S. E. 841, Ann. Cas. 1913A 894.

In *Pennsylvania Co. v. Roy* (1880), 102 U. S. 451, 26 L. Ed. 141, in speaking of the relation that the conductor and porter of a Pullman car bore to the railroad company, Justice Holmes said: "Their negligence, or the negligence of either of them, as to any matter involving the safety or security of passengers, while being conveyed, is the negligence of the railroad company." And further, it is said in 5 R. C. L. 183: "In cases where an injury occurs in a sleeping car the railroad and the sleeping car company are held to be jointly and severally liable."

The evidence discloses that appellant throughout her journey from Indianapolis to Louisville was under the care of the servants of appellee The Pullman Company, and, so far as the duties to be performed within the car where appellant and her husband were being transported were concerned, the evidence does not disclose

that the servants of appellee railroad company proper had anything to do in this connection whatever. In *Pullman Co. v. Pollock* (1887), 69 Tex. 120, 5 S. W. 814, 5 Am. St. 31, which is cited with approval in *Voss v. Wagner Palace Car Co.* (1896), 16 Ind. App. 271, 279, 43 N. E. 20, 44 N. E. 1010, it was held that a sleeping car company was liable if it failed to exercise reasonable care in protecting the baggage of a passenger where the same was stolen, although the train to which the car was attached belonged to another company. See, also, *Pullman Co. v. Gavin* (1893), 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. 902.

Although the parties in charge of the sleeping car in the case before us be regarded as the servants of appellee railroad company, under the law

3. (*Dwinelle v. N. Y., etc., R. Co.* [1890], 120 N. Y.

117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. 611;

Railroad v. Ray [1898], 101 Tenn. 1, 46 S. W. 554), they would have to be guilty of the negligence charged in order to sustain a verdict under the second paragraph of complaint as against appellee railroad company. And the jury having exonerated The Pullman Company and its servants from negligence by its verdict, appellant was not harmed by the court directing a verdict in favor of appellee The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. That is, if The Pullman Company was the servant of the railroad company, and was free from negligence as found by the verdict of the jury, then the railroad company, if it be treated as the master, could not have been found guilty of negligence, had it remained as a party defendant throughout the entire proceedings, considering, of course, that the jury was properly instructed as to this issue, and no other error intervened, which hereafter will receive further consideration. In *New Orleans, etc., R. Co. v. Jopes* (1891), 142 U. S. 18, 12 Sup. Ct.

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109, 35 L. Ed. 919, it was said: "It would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity." In *Doremus v. Root* (1901), 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, it was held that a verdict in favor of the conductor, who was sued jointly with the railroad company, would preclude a judgment against the railroad company, where the negligence charged grew out of the conduct of the conductor. To the same effect is *Indiana, etc., Torpedo Co. v. Lippincott Glass Co.* (1905), 165 Ind. 361, 75 N. E. 649.

As to the third paragraph of complaint, which charges appellee with conversion, appellant does not insist that this paragraph was sustained by the

4. evidence, nor could she with any degree of plausibility so contend under the facts, for, giving the facts and the inferences to be drawn therefrom their most favorable construction in her behalf, no more is disclosed than that the porter of ~~The~~ Pullman Company had knowledge that the parcel containing the diamonds at the time she entered the car was placed in an upper berth by appellant just above the berth to be occupied by herself and husband. Appellant did not part with the actual possession of the parcel; it was not turned over to the servants of The Pullman Company. Hence we need consider further only the issue of negligence as joined upon the second paragraph of complaint.

This brings us to the merits of the instructions upon the question of liability under the issue of negligence, and which involves the corrections of many instructions given by the court on its own motion, as well as numerous instructions tendered by appellant and refused to be given by the court.

The jury was instructed that if appellant established

by a preponderance of the evidence the material allegations of either the second or third paragraphs of complaint, she would be entitled to recover against The Pullman Company. And that, as to the second paragraph, she would have to establish that her jewelry was taken or stolen as alleged; that The Pullman Company was guilty of negligence as charged, which negligence was the proximate cause of her loss; that she was not guilty of negligence that proximately contributed to such loss, which, the jury was informed, were questions of fact for it to determine; that negligence under the circumstances was the doing of some act or thing that an ordinarily prudent person would not have done, or the failing to do some act or thing that an ordinarily prudent person would have done under the circumstances; that reasonable or ordinary care was that degree of care that an ordinarily prudent person would or ought to have exercised under the same or similar circumstances; that the loss or disappearance of the jewelry from the car would not entitle appellant to recover, as The Pullman Company could not be held to have insured its safety if she retained the custody; that in order to render it liable, the loss must have occurred by its failure to exercise reasonable care to protect the same, and its failure to exercise such care would render it liable to appellant; that appellant was required to establish that she exercised reasonable care for the safety of her property; and that ordinary care and diligence was imposed upon The Pullman Company to protect appellant's jewelry from being taken or stolen, and if the failure to exercise reasonable care on the part of The Pullman Company was the proximate cause of appellant being deprived of her property, The Pullman Company would be liable.

The principal objection pressed by appellant to the instructions given, of which the above is a brief sum-

mary, is that a higher degree of care is imposed upon a carrier holding itself out to the public as furnishing sleeping-car accommodations than that embodied in the court's instructions; that the exercise of ordinary care under the facts and circumstances here presented was not sufficient.

This question has recently been considered in *Repp v. Indianapolis, etc., Traction Co.* (1915), 184 Ind. 671, 111 N. E. 614, and the rule of law there ad-

5. duced from a review of the authorities is that the carrier's duty with reference to personal effects retained in the passenger's possession and control is to exercise reasonable care and caution to protect the same from loss or injury. That where the effects are kept within the possession of the passenger, the carrier is not the insurer of the safety of such effects, but is liable for loss or injury resulting from negligence, where the carrier or its servants fail to exercise reasonable care for the protection of the same. With the exception, however, that when the passenger,

6. without the knowledge of the carrier, has in his possession and control large sums of money or other property of exceptional value, the liability of the carrier does not extend to the same. The basis for this exception is that under the ordinary contract of carriage, the carrier assumes no obligation by its contract as to articles of property, which form no part of the passenger's ordinary luggage or personal effects.

In *Voss v. Wagner Palace Car Co.*, *supra*, it was said: "In the case of *Woodruff Sleeping and Parlor Coach Co. v. Diehl*, 84 Ind. 274, our Supreme Court very clearly defined the duties and liabilities of sleeping car companies toward occupants of berths upon their coaches. It was there held that such companies are not liable, either as innkeepers or common carriers, for the loss of goods or money, but that they are re-

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sponsible for such losses when the same occurred through the negligence of the company or its servants." See, also, 2 Shearman and Redfield, Negligence (6th ed.) §526b.

As disclosed by the instructions of the court to the jury, the question of liability of appellee The Pullman Company, the degree of care exacted of it in reference to appellant's property, as well as the question of negligence on the part of appellee The Pullman Company, and contributory negligence on the part of appellant, were all submitted to the jury, and under instructions that appear to have clearly stated the law in harmony with the foregoing decisions, and many others that might be cited. And the language employed by the court in instructing the jury seems to have been as favorable to appellant as could have been employed, and under the instructions, which informed the jury that if appellant was deprived of her jewelry by reason of appellee The Pullman Company or its servants failing to exercise reasonable care therefor, a verdict was returned for such company. Therefore no harm resulted to appellant on account of a verdict being directed by the court in favor of the railroad company, although, no doubt, the trial court would not have directed a verdict in this behalf if it regarded The Pullman Company as the servant of the railroad company, as numerous well-considered authorities hold.

It is not necessary to a decision of this case that we pass upon the question as to whether the amount of personal effects in the way of jewelry carried by appellant might be regarded as of such extraordinary value as to bring the case within the exceptions heretofore announced.

Appellant, as a party, was examined out of court before the day of trial, as the statute provides, and upon the trial of the cause, and by way of impeachment, she

was asked if she did not make certain answers

7. to questions theretofore propounded to her in such examination, the questions and answers being read to her from such examination; and the record here discloses by her testimony that she made the answers as set forth in the examination referred to. Counsel in argument, over the objection of appellant, read such questions and answers that he propounded on cross-examination from the examination taken out of court, and commented upon the same. Appellant insists that in the absence of the examination itself being put in evidence, it was improper for appellee's counsel to make use of the same as he did in his argument to the jury; that it was not a paper in the case. The identical questions and answers referred to by counsel in his argument went into the record on cross-examination of appellant, and if the same had been transcribed by the court reporter from his record and furnished to counsel, he would have had a similar document, so far as the language was concerned, to the one from which he read; and to the extent that it was made use of by counsel, it was a paper or document in evidence in the case, and as against the objection urged no prejudicial error was committed against appellant in this behalf.

A Pullman company's passenger check was put in evidence, which contained the following: "Property taken into car will be entirely at owner's risk." And

8. in the argument of the cause to the jury, appellant's counsel was refused permission to discuss the law relative thereto, being informed by the court that he could read the instructions of the court to the jury as the law of the case and make the application of such law to the facts. It is appellant's contention that the provision in the Pullman passenger check, as aforesaid, was void, and that he had a right to so state the law in this respect to the jury and especially was it

error to refuse him permission to do so in view of the fact that the court gave no specific instruction in reference thereto. No instruction given refers specifically to the passenger check or its contents, but irrespective of the same, the jury was informed that if The Pullman Company failed to exercise reasonable care for appellant's property while within its car under the circumstances disclosed by the evidence, and that it was lost or stolen by reason thereof, The Pullman Company would be liable for such loss. Thus, in effect, no importance was attached by the instruction of the court to the provision in the ticket; the instructions in this connection were quite favorable to appellant and the action taken by the trial court in reference to the passenger check was not prejudicial to appellant. As to the force of such a provision in a passenger's check, we express no opinion, it being unnecessary to a disposition of the cause.

After a consideration of each of the questions presented, we have reached the conclusion that no error was committed by the trial court that calls for a reversal of the judgment. The same is therefore affirmed.

NOTE.—Reported in 114 N. E. 36. Carriers: duty of sleeping car company as to baggage or personal effects of passengers, 21 L. R. A. 289, 9 L. R. A. (N. S.) 407, 41 L. R. A. (N. S.) 799, L. R. A. 1915B 621, 6 Cyc 661, 10 C. J. 1202, 5 Am. St. 35, 14 Ann. Cas. 521, Ann. Cas. 1912B 974; jewelry as luggage for which a carrier is responsible, 99 Am. St. 350.

TOWN OF POSEYVILLE v. GATEWOOD.

[No. 9,591. Filed December 14, 1916. Rehearing denied March 27, 1917. Transfer denied June 20, 1917.]

1. DEDICATION.—*Implied Dedication.*—*Requisites.*—*Intent.*—An implied dedication of land is one arising by law, from the acts of the owner, and the intention to dedicate, which is the foundation and vital element of every dedication, must clearly appear before a dedication can be implied. p. 52.
2. DEDICATION.—*Implied Dedication.*—*When Intent Inforced.*—Where the acts and conduct of a landowner are such as fairly and naturally lead to the conclusion that he intended to dedicate the land to the public use, and others have in good faith acted upon his open acts and conduct, he will not be permitted to aver that there was no dedication, but the law will conclusively infer that he intended what his acts and conduct indicated, regardless of any secret intent. p. 52.
3. DEDICATION.—*Implied Dedication.*—*Intent.*—*Evidence.*—The extent and character of the use of land is not in itself sufficient to show an intention to dedicate, nor is the time during which the user has been permitted, or mere nonaction, or acquiescence, or nonassertion of the title, sufficient, but such facts and any other circumstances bearing on that subject have probative force in determining whether there was in fact an intention to dedicate. p. 53.
4. APPEAL.—*Findings.*—*Conclusiveness.*—In an action for an injunction to restrain the obstruction of a drain across land claimed to have been impliedly dedicated to public use, whether the owner or his grantors intended to dedicate the way to the public was a question of fact which the trial court was to determine from the legitimate inferences to be drawn from all the evidence in the case, and the court's finding on such question is conclusive. p. 54.

From Posey Circuit Court; *Herdis F. Clements*, Judge.

Action by the town of Poseyville against Stephen Gatewood. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

James Kilroy, Lucius C. Embree and Morton C. Embree, for appellant.

Jesse Wade and F. P. Leonard, for appellee.

IBACH, J.—This is a suit for injunction and involves the right of appellant to maintain an open ditch or drain across a city lot, the property of appellee. There was a trial by the court, and a general finding and judgment for appellee. Appellant's motion for a new trial was overruled and such ruling is assigned as error and relied on for reversal. The grounds of the motion not waived relate to the sufficiency of the evidence.

The cause was submitted to the trial court upon three issues of fact, two of which appellant, in effect, admits it was unable to establish by the evidence. The remaining issue is that of dedication. The facts disclosed by the evidence on this branch of the case are in brief as follows: Appellant is an incorporated town. The lot in question is located in the town and was purchased by appellee about two years prior to the obstruction of the drain upon which this suit is predicated. Several years prior to such purchase appellant caused to be constructed a drain—the dimensions of which are not disclosed by the evidence—across the lot near the center. The lot is about 200 feet long. Since its original construction appellant has enlarged the drain until it was five feet deep and eight feet wide where it passed through appellee's lot. From time to time the drain was cleaned out by the employes of appellant. All of these acts were done with the knowledge and, so far as the record shows, without objection on the part of appellee's grantors, the then owners of the land. Since the construction of the drain other public and private drains have been connected with it and it has been used ever since its original construction to drain a considerable portion of the town. The obstruction placed by appellee causes the water to back up in the sewer and on the property of private owners above the obstruction. Appellee purchased the lot with knowledge of the drain and its surroundings.

Appellant contends that the foregoing facts are uncontradicted, and that the use by the public of the drain with the knowledge and acquiescence of appellee and his immediate and remote grantors for a period of almost twenty years, with knowledge of the character and extent of such use and without objection, conclusively established an implied dedication. We therefore proceed to consider whether or not the evidence in this case forces a conclusion different from that reached by the trial court.

An implied dedication is one arising by operation of law from the acts of the owner. The intention of the owner to set apart his lands for the use of the

1. public is the foundation and vital element of every dedication. This intention will govern in determining whether or not a dedication exists, in so far as the owner of the soil is concerned. The intention must clearly appear, and the acts and declarations of the owner relied on to establish it must be clear, convincing, and unequivocal. As was said in the case of *San Francisco v. Grote* (1898), 120 Cal. 59, 62, 52 Pac. 128, 41 L. R. A. 335, 65 Am. St. 155: "It is not a trivial thing to take another's land (without compensation), and for this reason the courts will not lightly declare a dedication to public use. It is elementary law that an intention to dedicate upon the part of the owner must be plainly manifest."

But the intent which the law regards is that which the open acts of the owner indicate and not a secret intent. Where the acts and conduct of the land-

2. owner are such as fairly and naturally lead to the conclusion that he intended to dedicate the land to the public use, and others have in good faith acted upon his open acts and conduct, he will not be permitted to aver that there was no dedication, but the law will conclusively infer that he intended what his

acts and conduct indicated. *City of Indianapolis v. Kingsbury* (1885), 101 Ind. 200, 213, 51 Am. Rep. 749; *City of Columbus v. Dahn* (1871), 36 Ind. 330, 337; *Town of Marion v. Skillman* (1891), 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55; *Faust v. City of Huntington* (1883), 91 Ind. 493, 494; *Cleveland, etc., R. Co. v. Christie* (1912), 178 Ind. 691, 697, 100 N. E. 299, and cases cited; *Cooper v. Monterey Co.* (1894), 104 Cal. 437, 38 Pac. 106; *Hartley v. Vermillion* (1902), (Cal.) 70 Pac. 273; *Bloomington v. Bloomington Cemetery Assn.* (1888), 126 Ill. 221, 227, 228, 18 N. E. 298; *McKey v. Hyde Park* (1889), 134 U. S. 84, 10 Sup. Ct. 512, 33 L. Ed. 860; *Board, etc. v. Huff* (1883), 91 Ind. 333, 343, 344; 13 Cyc 477. It must be concluded from these authorities that where the facts of a case fail to show an intent to dedicate some right to the public, the public will acquire no right by user for less than the statutory period.

The courts have repeatedly disclosed that extent and character of the use is not sufficient in itself to show an intention to dedicate; neither is the period of

3. time during which the user has been permitted of itself sufficient nor is mere nonaction or acquiescence or nonassertion of title sufficient, but such facts and any other circumstances bearing on that subject have probative force in determining whether or not there was in fact such intention. *Shellhouse v. State* (1887), 110 Ind. 509, 11 N. E. 484; *McKey v. Hyde Park, supra*; Washburn, Easements and Servitudes (4th ed.) 212; *Faust v. City of Huntington, supra*; *Mauck v. State* (1879), 66 Ind. 177, 183. Mere evidentiary facts of themselves do not constitute dedication. *Shellhouse v. State, supra*; *Mauck v. State, supra*.

Applying these principles to the facts and circumstances shown by the record, it seems that the most that

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can be said of appellee's conduct and that of his

4. immediate and remote grantors is that they show nonassertion of a right, a mere acquiescence on their part in the use by the public of the drain for a number of years without objection. At any rate, whether or not appellee or his grantors intended to dedicate the way to the public was a question of fact which the court was to determine from the legitimate inference to be drawn from all the evidence in the case. Since the trial court has found that an intention to dedicate the land in suit to a public use was not satisfactorily established, we are not at liberty to dispute its conclusion.

We have held that the judgment of the lower court must be sustained upon the issue of dedication; and, as the pleadings do not present the question whether appellee, as grantee "of his predecessors' title" to the land, was estopped from interfering with the use of the drain by appellant, we are not called upon to discuss it. Judgment affirmed.

NOTE.—Reported in 114 N. E. 483. Dedication: by implication, intent, 13 Cyc 454, 52 Am. Dec. 479.

MAYER v. MELLETTE.

[No. 9,111. Filed November 28, 1916. Rehearing denied March 16, 1917. Transfer denied June 20, 1917.]

1. *APPEAL.—Review.—Verdict.—Presumptions.*—In an action for damages sustained in an automobile collision at a street intersection, in the absence of a finding that plaintiff knew, at the time she saw defendant approaching, that he was driving recklessly, it will be assumed, if necessary to support the general verdict in plaintiff's favor, that she acquired such knowledge when defendant's car reached a point near her own, thus creating an emergency involving a possible collision and her own safety. p. 59.
2. *MUNICIPAL CORPORATIONS.—Streets.—Priority of Right to Use at Street Intersections.*—The driver of an automobile,

much closer to a street intersection than another driver, apparently had the right of way, there being no ordinance or regulation to the contrary, and, in the absence of an indication that it was imprudent to do so, she was authorized to go forward. p. 59.

3. MUNICIPAL CORPORATIONS.—*Streets.—Use at Intersections.—Right of Parties.*—Although it is the general rule that when two automobiles are approaching a street crossing the one nearest thereto has the right of way, if the situation is such as to impress a reasonably prudent person that a collision will occur unless the driver having the right of way stops his car, it is his duty to do so rather than to enter the intersecting street. p. 59.
4. NEGLIGENCE.—*Collision on Streets.—Contributory Negligence.—Sudden Peril.—Care Required.*—Where one about to drive an automobile into a street intersection is suddenly confronted with the peril of an impending collision with another car driven at a negligent and reckless rate of speed, he is not guilty of contributory negligence if his conduct under the circumstances and in view of the emergency is that of a person of ordinary prudence. p. 60.
5. NEGLIGENCE.—*Collision on Streets.—Contributory Negligence.—Jury Question.*—In an action for injuries to the driver of an automobile sustained in a collision at a street intersection, answers to interrogatories showing that plaintiff, a woman, was driving west toward the crossing and that defendant's car was being driven north toward the same, that when plaintiff was about to turn into the intersecting street at a speed of eight miles an hour she looked to the north and saw defendant's car about 100 feet away approaching the crossing at a speed between thirty-five and forty miles an hour, that plaintiff began to turn southward as she entered the cross street, and, in attempting to avoid a collision with the other car, increased the speed of her automobile and ran into a telephone pole, present a case for the jury on the issue of contributory negligence. p. 60.
6. NEGLIGENCE.—*Collision on Streets.—Evidence.—Sufficiency.*—In an action by an automobile driver for damages resulting from a collision with a telephone pole, alleged to be due to the negligence of the driver of another car, evidence showing that as plaintiff, a woman, was proceeding toward a street crossing from the east at a speed of eight miles an hour she saw defendant about 100 feet southward approaching the intersection at a speed of thirty-five to forty miles an hour, that defendant's car was headed directly toward that of plaintiff as she was making the turn into the cross street, that plaintiff, in an

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attempt to avoid a collision, increased the speed of her car and drove it into a telephone pole, and that immediately thereafter defendant returned and assumed responsibility for the accident, stating that he was driving too fast, is sufficient to sustain a verdict for plaintiff. p. 61.

7. MUNICIPAL CORPORATIONS.—*Streets.—Use at Intersections.—Negligence.—Violation of Statute or City Ordinance.*—One driving an automobile across a street intersection at a speed of eight miles an hour in violation of §10465 Burns 1908, Acts 1907 p. 558, or an ordinance of the city of Indianapolis, is guilty of negligence. p. 63.

8. MUNICIPAL CORPORATIONS.—*Collision on Streets.—Proximate Cause.—Violation of Statute or Ordinance.*—Where plaintiff, driving an automobile, negligently crossed a city street intersection at a speed of eight miles an hour in violation of both a statute and a city ordinance, it does not conclusively follow that such violation was the proximate cause of plaintiff colliding with a telephone pole in attempting to avoid being struck by defendant's car, where the position of plaintiff's automobile at the time of the accident would not have been substantially different had she proceeded at the rate of speed fixed by the statute or ordinance. p. 63.

9. APPEAL.—*Review.—Refusal of Instructions.*—Where plaintiff drove her automobile across a street intersection at a speed of eight miles an hour, while defendant approached the crossing in his car at a speed of forty miles an hour, both drivers violating a statute and a city ordinance regulating the speed of automobiles, and, in attempting to avoid a collision with defendant's car, plaintiff drove her machine into a telegraph pole, it was not error for the court to refuse a requested instruction that plaintiff's violation of the statute and ordinance was negligence, and there could be no recovery if it proximately contributed to the injury, where the jury was warranted in finding that plaintiff was placed in a position of imminent peril by reason of defendant's negligence and reckless driving, since, in such a case, plaintiff was not guilty of negligence, though she violated the speed regulation, if her conduct under the circumstances was that of a person of ordinary prudence. p. 64.

From Marion Superior Court (90,772); *Clarence E. Weir*, Judge.

Action by Edna Mellette against Edward L. Mayer. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Taylor, Carter & Wright, for appellant.

Russell Willson and Romney L. Willson, for appellee.

CALDWELL, J.—Appellee's complaint is in substance as follows: About ten o'clock on the morning of May 25, 1912, she was driving a small automobile westward along the north side of Twenty-fifth street, approaching its intersection with Delaware street in the city of Indianapolis, intending to turn south into and along the latter street. At the same time appellant was driving a large automobile northward along the center of Delaware street, approaching its intersection with Twenty-fifth street, and intending to drive thence north along the former street. Appellee having reached the center of Delaware street, was in the act of making a turn southward to reach the west side of the street whereupon appellant approached, driving his car at the negligent and unlawful speed of twenty-five miles per hour, and as a consequence appellee was unable to complete the turn, but to escape a collision was compelled to, and did, accelerate, as her car was headed southwest, and as a result her car was driven into contact with the curb and a telephone pole standing at the southwest corner of the intersection, whereby appellee's car was damaged, and she suffered certain physical injuries specifically described in the complaint.

The complaint charges appellant with negligence in speed, and in failing to turn his car to the east side of the street. The sufficiency of the complaint is not questioned. Answers having been filed and the case brought to issue, a trial resulted in a verdict in appellee's favor for \$700, on which judgment was rendered.

Appellant urges that the court erred in overruling his motion for judgment on the answers returned by the jury to interrogatories submitted. These answers disclose the following facts: Twenty-fifth street is twen-

ty-four feet wide from curb to curb and fifty feet wide from property line to property line. The corresponding dimensions of Delaware street are thirty feet and fifty feet, and both streets are in a closely built up section of the city. A brick storeroom extended to each property line at the northeast corner of the intersection. The front wall of a dwelling house at the southeast corner of the intersection extended to within twenty-eight feet and its front porch to within twenty feet of the Delaware street curb. Appellee's speed approaching Delaware street along the north side of Twenty-fifth street was about twelve miles per hour. On entering the latter she reduced her speed to eight miles per hour. Immediately after passing the line of the porch, she saw appellant's car approaching at a point about 100 feet south of Twenty-fifth street. There was nothing to prevent her from seeing it continuously thereafter until it passed in front of her car. It passed, however, to the rear or east of her car, colliding with it slightly. Appellee began to make the turn southward as she entered Delaware street rather than after she reached the center, and having commenced to make the turn, she did not thereafter change the course of her car, made no effort to stop it, and thereby avoid colliding with the pole that stood a few feet southwest of the southwest corner of the intersection, but, on the contrary, accelerated and ran into the pole, and thereby damaged her car. There was nothing to prevent her from driving west across the intersection and along Twenty-fifth street, except that her car was headed southwest. A car such as appellee was driving, when running twelve miles per hour, could be stopped in six or seven feet. Appellee purchased her car May 14, 1912. Prior to the purchase she had four weeks' experience in driving a car.

Appellant, in support of his motion, contends that

the facts found establish affirmatively that the accident was caused proximately by appellee's contribu-

1. tory negligence. It is not, and cannot consistently be, argued that the facts found acquit appellant of negligence. It must therefore be assumed in considering such motion that appellant was guilty of negligence as charged and as determined by the general verdict. There is no finding that appellee knew at the time when she saw appellant approaching that he was driving recklessly, if such were the case. It should therefore be assumed, if necessary to sustain the general verdict, that she acquired such knowledge when appellant's car had reached a point near appellee's car, thus creating an emergency involving a possible collision and consequently appellee's safety. When appellee's car was twenty feet from the east line of the intersection, appellant's car was 100 feet south of

2. its south line. As appellee was much closer to the intersection than appellant, and the record disclosing no ordinance or regulation to the contrary, appellee apparently had the right of way, and, in the absence of an indication that it was imprudent to do so, she was authorized to go forward. *Elgin Dairy Co. v. Shepherd* (1915), 183 Ind. 466, 474, 108 N. E.

234, 109 N. E. 353. She did go forward reduc-

3. ing her speed as, under ordinary circumstances, would be proper, considering that she was entering an intersection and that it was her purpose to turn to the south. It is true that under some circumstances it would have been her duty to stop her car rather than enter the intersection, as if the situation were such as to impress a reasonably prudent person that otherwise a collision would have been likely. The answers here, however, do not compel such a presumption. If the length of appellee's car be added to the breadth of appellant's, and the sum deducted from the width of the

street between curbs, the portion of the street available for clearance purposes is approximately ascertained. The car dimensions, however, are not found. Such available space was divided, a part being on the east side and a part on the west side, after appellee had entered the intersection. Appellee by proceeding increased the clearance on the side of the street to which appellant should have guided his car in passing, and it would therefore seem that she properly moved forward. Moreover, had appellee merely proceeded at a reduced speed, and had appellant continued at the alleged speed, by calculation it may be determined that a disastrous collision would have been probable. Apparently, therefore, she properly accelerated. It is a reasonable assumption under the answers to the interroga-

4. tories, aided by presumptions that must be indulged in view of the allegations of the complaint, that appellant's negligence gave rise to an emergency wherein appellee was compelled hastily to elect between appellant's car probably colliding with her car, and driving her own car towards the curb and pole. She chose the latter course. If her conduct under the circumstances and in view of the emergency was that of a person of ordinary prudence, she was not guilty of contributory negligence. *Indiana Union Traction Co. v. Love* (1913), 180 Ind. 442, 99 N. E. 1005; *McIntyre v. Orner* (1905), 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. 359, 8 Ann. Cas. 1087.

The facts found in answer to the interrogatories

5. present a case properly for the jury on the issue of contributory negligence. The jury by the general verdict determined that issue in appellee's favor. The court did not err in overruling the motion.

Appellant challenges the sufficiency of the evidence. There was evidence to sustain the facts returned in answer to the interrogatories and other evidence in some

respects contradictory, however, to the following

6. effect: Appellant approached the intersection, driving along or west of the center line of the street, his speed being thirty-five to forty miles per hour. He was approaching in a direct line towards appellee's car as the latter was making the turn, whereupon she accelerated and drove her car into the pole. Appellant's car struck the rear part of the left rear fender of appellee's car, damaging it slightly. Appellant's car came to a stop in the center of the street some distance north of the intersection. There was evidence, not accepted by the jury as true, however, that appellant's car passed in front of appellee's car and in so doing that it was guided to the west, and other evidence that its course was not changed. The evidence is conclusive that appellant was driving very much faster than appellee. Appellant, having stopped his car, returned to the intersection, and stated that he was to blame for the accident, and that he was driving too fast. He complimented appellee for the manner in which she handled her car, and commended the coolness which she manifested in the occurrence. Appellant testified in substance that the respective situations and courses of the two cars were such as threatened an immediate and a very serious collision, averted, however, by his act in turning to the west and passing in front of appellee's car. As we have said, however, there was other evidence and the jury so found that appellant passed to the rear of appellee's car. Considering only the evidence favorable to that end, as the rule that obtains in this court requires us to do, it is sufficient to sustain the verdict.

Instruction No. 11 requested by appellant was refused. It is to the effect that in the closely built up sections of the city the lawful rate of speed was eight miles per hour, and one-half the ordinary speed in mak-

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ing the turn from one street to another and at intersections, and that, if the jury found from the evidence that the accident occurred in a closely built up section of the city, and that appellee violated the statute or ordinance regulating such speed, such violation was negligence, and if such violation proximately contributed to the accident, appellee could not recover, and that the verdict should be for the appellant.

Section 10465 Burns 1908, Acts 1907 p. 558, was in force at the time of the occurrence involved here. Its material part is in substance that no person should operate a motor vehicle in any public highway at any rate of speed greater than is reasonable and proper, and that in no event should it be operated at a greater rate of speed than eight miles per hour in the business or closely built up portions of any municipality, and that on approaching a crossing or intersecting highway, a motor vehicle should not be operated at a speed greater than is reasonable and proper. This statute has since been superseded by a later enactment. Acts 1913 p. 779, §10464 *et seq.* Burns 1914.

Section 7 of an ordinance of the city of Indianapolis, enacted in 1910, was read in evidence. It is as follows:

“No vehicle shall cross a main thoroughfare or make a turn at a speed rate exceeding one-half its regular speed.”

Treating the ordinance as supplemental to the statute, we construe the term “regular speed,” as used in the former, to mean a speed otherwise lawful. The effect of the ordinance then in its relation to this case was to render it unlawful to drive a motor vehicle across a main thoroughfare or in making a turn in the closely built up sections of Indianapolis at a greater rate of speed than four miles per hour. Returning to a consideration of the refused instruction, it was broad

enough in its terms to bring to the consideration of the jury two situations, the one of which merged immediately into the other. Portraying the first, there was evidence that appellee approached the intersection, driving at the rate of twelve miles per hour, and that on reaching the intersection she reduced the speed to eight miles per hour. These facts were also specifically found by the jury. She approached the intersection then at a speed exceeding the statutory rate, if the location was within a closely built up section of the city, and the jury so found. There was no direct evidence whether appellee traversed the intersection at a speed of eight miles per hour after entering it, and down to the point where she accelerated. She reduced her speed to eight miles per hour at the line of the intersection, but whether such speed continued, or whether she actually traveled to the center of Delaware street in excess of the ordinance rate, is left to inference. There was evidence then that appellee violated the statute approaching the intersection, but the jury was warranted in finding either way on the question of whether she violated the ordinance while traversing the intersection to the center of Delaware street. In

7. violating the statute she was guilty of negligence.

If the jury found she violated the ordinance, she was guilty of negligence also in that respect. To that effect was the tendered instruction. *M. S. Huey Co. v. Johnston* (1904), 164 Ind. 489, 73 N. E. 996; *Pennsylvania Co. v. Horton* (1892), 132 Ind. 189, 31 N. E. 45; *Fox v. Barekman* (1912), 178 Ind. 572, 99 N. E. 989.

The instruction was further to the effect that if

8. appellee's negligence in violating the statute or ordinance contributed proximately to the injury, the verdict should be for appellant. While appellee was in the situation indicated, appellant was driving his car at an unlawful and negligent rate of speed in a direct

line toward her car. As we have said, the jury might have inferred from the evidence that appellee's car traversed the intersection in excess of the ordinance rate, and that it occupied its exact location by reason thereof. Had the jury so inferred, and had a collision occurred at that point, it would not have conclusively followed that appellee's violation of the ordinance contributed proximately to such collision, for the reason that the position of her car would not have been substantially different had she run within the ordinance rate. The situation and circumstances were such, however, as to render the question of proximate cause, in its relation to appellee's entire conduct, one of fact for the jury. The tendered instruction so treated it; and were no other situation involved, we should feel bound to hold that its refusal was error. There was, however, another situation. As we have said, appel-

9. lee, in traversing the intersection to its center, may or may not have violated the ordinance, and consequently may or may not have been guilty of negligence in that respect. As appellee reached the halfway point of the intersection, a collision was imminent. The witnesses agree on that question. Appellee thereupon accelerated and thereby barely averted a disastrous collision, but in so doing drove the car into the pole, and thus the injury was inflicted. Regardless of what may have been the view of the jury respecting appellee's speed as she traversed the intersection to the center of Delaware street, the evidence was sufficient to warrant a finding that, after accelerating, she exceeded the ordinance rate. The tendered instruction as applicable to such situation, being the situation that developed rapidly and immediately into the injury, would have required the jury to find that a speed provoked by such an emergency, if in excess of the ordinance rate, was negligence. As we have hereinbefore indi-

cated, to such a situation another principle is applicable: Where a person being without fault is brought face to face with an imminent peril occasioned by another's negligence, his conduct in the emergency in seeking to rescue himself from such peril must be measured by the standard of a person of ordinary prudence; that is, if appellee was placed in such position of imminent peril through no fault of her own, but by reason of appellant's negligence, and, as we have said, the jury would have been warranted in so finding, and if her conduct in accelerating her car was that of a person of ordinary prudence under the circumstances, she was not guilty of negligence in so doing, even though she exceeded the ordinance rate. In addition to authorities above cited, see the following: *City of Indianapolis v. Pell* (1916), 62 Ind App. 191, 111 N. E. 22; *Lake Shore, etc., R. Co. v. Myers* (1912), 52 Ind. App. 59, 98 N. E. 654, 100 N. E. 313; *Schultz v. State* (1911), 89 Neb. 34, 130 N. W. 972, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912C 495; *Dickinson v. Erie R. Co.* (1910), 81 N. J. Law 464, 81 Atl. 104, 37 L. R. A. (N. S.) 150, 2 R. C. L. 1192; *LeMay v. Springfield Street R. Co.*, 37 L. R. A. (N. S.) 43, note; *Cloherly v. Griffiths* (1914), 82 Wash. 634, 144 Pac. 912; *Calahan v. Moll* (1915), 160 Wis. 523, 152 N. W. 179, L. R. A. 1916A 744, and note; *Sheffield v. Union Oil Co.* (1914), 82 Wash. 386, 144 Pac. 529.

In the case last cited, involving circumstances somewhat similar to those presented here, the court said: "It is true, we have said in a number of cases, and it is undoubtedly the law, that failure to observe the law of the road is negligence. But this rule must be applied in connection with the circumstances under which its observance is called for, and as applied to the facts of this case, we do not think that we can say, as a mat-

ter of law, that respondent's act was such as to preclude his recovery." We conclude that, under the circumstances of this case, the court did not err in refusing the tendered instruction.

We find no error in giving instructions complained of or in refusing other instructions tendered. Judgment affirmed.

NOTE.—Reported in 114 N. E. 241. Negligence: violation of statute or ordinance as contributory negligence, 4 Ann. Cas. 513; rights and duties of drivers of automobiles on highways, 108 Am. St. 215; law of the road at crossings, 1 Ann. Cas. 164. Trial: respective functions of court and jury with respect to question of proximate cause, Ann. Cas. 1913B 351.

FARMERS' AND MERCHANTS' MUTUAL LIFE ASSOCIATION v. MASON.

[No. 9,264. Filed June 21, 1917.]

1. INSURANCE.—*Life Insurance.—Premiums.—Payment by Note.*—The payment of an insurance premium by note may be either absolute or conditional, depending on the intention of the parties at the time of the execution of the note, and the intention may be expressed in the policy, or in the note itself. p. 74.
2. INSURANCE.—*Life Insurance.—Payment by Note.—Effect.*—A nonnegotiable note given for insurance premiums was merely a conditional, and not an absolute, payment, where a provision in the insurance certificate designated payment by note as an attempted payment, the insurer's receipt was given for the note and not for the premium, and there was no evidence of an agreement that the note was to be accepted as absolute payment of the premiums for which it was given. pp. 74, 75.
3. BILLS AND NOTES.—*Negotiability.—Statutes.*—A note executed prior to the Negotiable Instruments Act, §9089a *et seq.* Burns 1914, Acts 1913 p. 120, and not payable in a bank in this state, is nonnegotiable. p. 75.
4. INSURANCE.—*Life Insurance.—Premiums.—Payment by Note.—Policy Provisions.—Scope and Effect.*—Provisions in a policy of insurance in reference to the payment of premiums by note need not be incorporated in the note to make such provisions effective. p. 77.
5. INSURANCE.—*Life Insurance.—Forfeitures.—Payment of Premiums by Notes.*—An insurance certificate providing that it

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- shall be incontestable after two years, except for the non-payment of premiums, may be contested after such period on the ground that a note given for premiums past due was not paid, where the note was not accepted as absolute payment, but merely operated to extend the time for payment, so that failure to pay the note was failure to pay the premiums for which it was given. p. 78.
6. **INSURANCE.—Contracts.—Construction.**—An insurance certificate should be construed as a whole, and, if possible, every part thereof given effect. p. 79.
7. **INSURANCE.—Life Insurance.—Policy.—Construction.—Forfeitures.**—A provision in a certificate of insurance that the certificate should be incontestable after two years, except for nonpayment of premiums, is not in conflict with a forfeiture clause providing for the lapsing of a certificate where a note given in payment of a premium is not paid, as the provisions, when construed together, mean that the certificate may be contested after two years for the nonpayment of premiums or notes given therefor. p. 80.
8. **INSURANCE.—Life Insurance.—Policy.—By-Laws.—Construction.**—Whether an insurance association's by-law as to the lapsing of an insurance certificate is unenforceable as being too indefinite is immaterial, where the situation is definitely covered by a provision in the certificate itself. p. 80.
9. **INSURANCE.—Life Insurance.—Forfeitures.—Retention of Unpaid Premium Note.**—An insurance company did not waive a provision forfeiting the policy for nonpayment of premiums by merely retaining an unpaid note given for premiums, where the insurer made no effort to collect the note, or to assert it, as an obligation against the insured or his estate, and refused to accept payment from the beneficiary after the death of the insured. pp. 81, 83.
10. **INSURANCE.—Forfeitures.—Payment of Premiums.—Waiver.**—A provision in an insurance certificate for forfeiture for nonpayment of a premium or a premium note, being for the benefit of the insurer, may be waived by it. p. 82.
11. **INSURANCE.—Life Insurance.—Forfeitures.—Nonpayment of Premium.**—The fact that an insurer sometimes applied commissions due from it to the insured for premiums owed by him is not sufficient evidence that it waived the forfeiture provided by the terms of the policy for nonpayment of premiums as regards premiums due and unpaid at a time when insured had no commissions to his credit, since the insurer was under no obligation to await the accumulation of commissions which could be applied to the payment of delinquent premiums. pp. 84, 86.

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12. **INSURANCE.—Forfeiture.—Waiver.—Definition.**—Waiver is where one in possession of any right, whether conferred by law or by contract, and with full knowledge of material facts, does or forbears the doing of something inconsistent with the existence of the right or his intention to rely upon it. p. 86.
13. **INSURANCE.—Life Insurance.—Forfeiture for Nonpayment of Premiums.—Estoppel.**—An insurer is not estopped from asserting a forfeiture, as provided in the policy, for nonpayment of premiums because commissions earned by insured in selling insurance had at times been applied on premiums due from him, and because he had been reinstated on payment of delinquent premiums, where no premiums had been paid in commissions during the last fifteen months preceding the death of the insured, and he had been required to furnish a certificate of good health on several occasions as a condition precedent to reinstatement after failure to pay premiums when due. pp. 88, 91.
14. **INSURANCE.—Forfeiture for Nonpayment of Premiums.—Estoppel.**—An insurer will be estopped to insist upon a forfeiture, if, by an agreement, either expressed or implied by the course of its conduct, it leads the insured to believe that his premiums will be received after the appointed day. p. 88.
15. **INSURANCE.—Life Insurance.—Accepting Delinquent Premiums.—Waiver.**—An insurer's occasional voluntary indulgence in accepting delinquent premiums, in the absence of an express or implied agreement to waive payment of assessments according to the conditions of the contract, cannot be construed as a permanent waiver, or as depriving the company of the right to insist upon a forfeiture, or to cancel its policy on account of the failure to pay according to the stipulations therein. p. 90.
16. **INSURANCE.—Policy.—Forfeiture Clauses.—Construction.**—Though forfeitures are not favored by the law, courts must enforce them when the party by whose fault they are incurred cannot show some good ground in the conduct of the other party on which to base a reasonable excuse for the default. p. 91.
17. **INSURANCE.—Life Insurance.—Policy Provisions.—Waiver.—Evidence.—Admissibility.**—In an action on a life insurance policy, which required, as a condition precedent to reinstatement when a policy had lapsed for nonpayment of premiums, that insured should furnish a satisfactory certificate of good health, where the jury was required to determine whether the policy had been reinstated by the insurer's acceptance of a note for delinquent premiums for a period up to a certain date, a postal card from the insurer to the insured notifying him

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that another premium, payable in advance, was due on such date was admissible on the question of whether the requirement as to the certificate of good health had been waived by the insurer, there being no evidence that such certificate had been furnished. p. 92.

18. *INSURANCE.—Life Insurance.—Evidence.—Receipts of Premium Payments.—Admissibility.*—In an action to recover on a life insurance policy, receipts executed by the insurer showing the payment of premiums by insured are admissible as tending to show that insured had performed his part of the contract. p. 92.

19. *INSURANCE.—Life Insurance.—Action on Policy.—Instructions.—Ignoring Evidence.—Nonpayment of Premiums.*—In an action on a certificate of insurance, an instruction that, if insured executed a note in payment of all premiums up to specified date, and the insurer accepted such note as payment, the insured might recover, was erroneous as ignoring the fact that under the provisions of the certificate it might lapse if the note was not paid. p. 92.

20. *INSURANCE.—Life Insurance.—Action on Policy.—Instructions.*—In an action on an insurance certificate, an instruction that the insured's acceptance of a note for delinquent premiums kept the certificate in full force up to a specified date, and that insured could keep it alive by paying the premium due immediately after such date, was erroneous as ignoring the possibility that under the provisions of the certificate it might lapse upon nonpayment of the note. p. 93.

From Pike Circuit Court; *John L. Bretz*, Judge.

Action by Elizabeth Mason against the Farmers' and Merchants' Mutual Life Association. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Lucius C. Embree and *Morton C. Embree*, for appellant.

John R. Brill, *Frank H. Hatfield* and *John W. Brady*, for appellee.

BATMAN, J.—On May 30, 1910, appellant issued a certificate on the life of Ulysses G. Mason in the sum of \$1,000, in consideration of the payment of quarterly premiums of \$4.91 on the first days of January, April, July, and October in each year, in which appellee, the wife of the insured, was named as the beneficiary. The

insured died on April 28, 1913, and appellee filed her complaint in the court below in three paragraphs, to recover on said certificate. The first paragraph was dismissed, and trial was had on issues formed on the second and third paragraphs. As no question is presented in this court on the sufficiency of the pleadings, we will only briefly indicate their contents. The first paragraph of the complaint alleges in substance, among other things, the issuance of the certificate, the death of the insured, and the performance on the part of appellee and the insured of all the conditions of said policy on their part to be performed, while the second paragraph excepts from such performance the payment of a portion of such premiums in cash, alleges the execution of promissory notes in payment of such portions, that such promissory notes were accepted by appellant in lieu of cash, and that it thereby waived the requirement of said certificate in that regard. A copy of the certificate was filed with each of said paragraphs of complaint and made a part thereof.

Appellant filed its answer in one paragraph in which it admitted the execution of the certificate of insurance mentioned in the complaint, and that at its inception it constituted a valid contract, but alleged facts to show that such certificate had lapsed, prior to the death of the insured, by reason of the nonpayment of a note given for premiums.

Appellee filed a reply in two paragraphs. The first was a general denial. The second alleges facts on which it bases a claim that all premiums on such certificate had been fully paid, except the quarterly premium due April 1, 1913, and that the insured died within the thirty days of grace allowed for its payment. It also alleges that at the time of the insured's death appellant owed him a sufficient amount of commissions to pay

all premiums on said certificate, which should have been credited thereon, and that appellant had theretofore accepted from the insured other notes for various quarterly premiums.

There was trial by jury, resulting in a verdict for appellee for \$1,078, and judgment was rendered accordingly. Appellant filed a motion for a new trial, which was overruled. This action of the court below is the only assigned error presented by appellant in its brief as cause for reversal. Appellant alleges as reasons for a new trial that the verdict of the jury is contrary to law; that it is not sustained by sufficient evidence; that the amount of recovery is too large; that the court erred in the admission of certain evidence, and in giving and refusing certain instructions.

The undisputed evidence shows the following facts: The certificate in suit was issued by appellant on May 30, 1910. Quarterly premiums thereon in the sum of \$4.91 were to be paid in advance on the first days of January, April, July, and October of each year. All premiums were paid to and including September 30, 1912. Default was made in the payment of the quarterly premium which fell due on October 1, 1912. Said premium was still in default on December 14, 1912, when appellant accepted the promissory note of the insured for \$4.91, due thirty days after said date for the amount of the same. Default was also made in the payment of the quarterly premium which fell due on January 1, 1913, and also in the payment of said note at its maturity. Both remaining unpaid on February 4, 1913, appellant surrendered said note, and accepted another promissory note of the insured for the amount of said first note, and said premium which fell due on January 1, 1913, as follows:

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“\$9.82 Princeton, Ind., Feb. 4, 1913.

“Thirty days after date, I promise to pay to the order of the Farmers and Merchants Mutual Life Association, of Princeton, Ind., the sum of Nine and 82-100 Dollars, together with interest thereon at the rate of 6 per centum per annum from date until paid and with Attorney's fees, all payable without any relief from valuation and appraisal laws, for value received.

“Payable at Home Office, Princeton, State of Indiana.

“Due March 4, 1913.

“U. G. Mason.”

At the time appellant accepted said note it delivered to the insured a receipt as follows:

“Farmers & Merchants Mutual Life Association.

“Certificate No. 808.

“Princeton, Ind., Feb. 4, 1913.

“Received of U. G. Mason, note for \$4.91 dues for the quarter ending April 1, 1913.

“W. S. Hastings, Secretary.”

No part of said note has been paid, and no offer was made to pay the same prior to the insured's death, but the same is still retained by appellant. The quarterly premium of \$4.91, which fell due on April 1, 1913, has never been paid. The insured departed this life on April 28, 1913, from a cause covered by such certificate. The certificate in suit contains, among other things, the following provisions:

“Upon the failure of the above member to make any payment due from him to the Association all payments made shall be forfeited and his membership cease, except as hereafter provided. This certificate shall be incontestable after two years from its date, except for nonpayment of any premium due this association, and except for violation of the conditions of the certificate relating to naval and military service in time of war.

“Premium to be due and payable quarterly in advance, at the home office of the Association, or to an Agent of the Company, upon delivery of a re-

ceipt signed by the Secretary or President of said Association, the member to have thirty (30) days of grace after the first year for the payment of said premiums, provided that if the insured shall die within such period of grace, the unpaid premium for the current year may be deducted in any settlement under the policy.

"In case any note, check or draft given in payment or in part payment of money due the Association shall not be paid at maturity the certificate shall lapse in the same manner as it would had the payment not been attempted, provided, however, that if said check, note or draft be given for the payment of any premium due subsequent to the first year, thirty (30) days of grace shall be allowed as above provided.

"This policy and the application constitutes the entire contract between the parties. No agent of this Company has power to change this contract, waive forfeitures, extend credit or grant permits.

"If this policy shall lapse by non-payment of premium, the insured may however within sixty days thereafter be reinstated by paying any sum due from him, and furnishing the Company at its Home Office a satisfactory certificate of good health, or at any time within two years by furnishing the Company a satisfactory Medical Examination."

Endorsed on the back of such certificate is the following:

"Agents are not authorized to waive forfeitures, or to make, alter or discharge contracts. No agent has authority in any case to waive or postpone payment of premium."

The application made by the insured for such certificate, and which by its terms became a part thereof, contained the following:

"That if any of the conditions of the by-laws of the association are violated the applicant or his beneficiary surrenders all right of recovery under this certificate of membership."

That at the time of the execution of said certificate,

and continuously to the death of the insured, there was in full force and effect a certain by-law of appellant, with reference to the lapsing of such certificate on the nonpayment of a note, given in payment of money due it, of like tenor as the one contained in such certificate, as set out above.

Appellant contends that the failure of the insured to pay the said note of \$9.82 given for the two quarterly premiums, either at its maturity, or within

1. the thirty days of grace allowed therefor, caused such certificate to lapse, and hence appellee cannot recover. This contention requires a determination of the effect of the acceptance of such note by appellant. The payment of a premium by note may be either absolute or conditional. If absolute, the insurer accepts the liability of the party executing the note in satisfaction of the premium, but if conditional, its nonpayment remits the insurer to its original right to demand payment of the premium. *Vance, Ins.* 209. Whether such payment is absolute or conditional depends on the intention of the parties at the time of the execution of such note. Such intention must be determined as any other fact, and may be expressed in the policy providing for such premium, or in the note itself. 25 Cyc 826; 3 Cooley, Briefs on Ins. 2269; 2 Bacon, Life and Acc. Ins. (4th ed.) §475; *Thompson v. Insurance Co.* (1881), 104 U. S. 252, 26 L. Ed. 765; *Forbes v. Union, etc., Ins. Co.* (1898), 151 Ind. 89, 51 N. E. 84; *Union, etc., Ins. Co. v. Adler* (1906), 38 Ind. App. 530, 73 N. E. 835, 75 N. E. 1088.

This rule does not seem to be controverted, but different contentions are made as to its application to the facts of this case. One contention is that the

2. acceptance of the note in question was a conditional payment of the premiums it represented, and the failure to pay the same was in effect a failure

to pay such premiums. The other contention is that the acceptance of such note was an absolute payment of such premiums, and therefore the nonpayment of such note in no way affected their payment. In considering whether the acceptance of such note was an absolute or conditional payment of such premiums, it will be observed that the note itself makes no provision for a forfeiture of the certificate by reason of its nonpayment. It was executed prior to the act of 1913

3. affecting negotiable instruments, and, as it is not payable in a bank in this state, it is nonnegotiable. Under the general rule prevailing in this

2. state with reference to the acceptance of nonnegotiable notes as payment, it is apparent that the acceptance of the note in question by appellant cannot be held to have constituted absolute payment of the quarterly premiums for which it was given in the absence of proof of an agreement to that effect. *Smith v. Bettger* (1879), 68 Ind. 254, 34 Am. Rep. 256; *Jeffries v. Lamb* (1880), 73 Ind. 202; *Travellers' Ins. Co. v. Chappelow* (1882), 83 Ind. 429; *Bradway v. Groenendyke* (1899), 153 Ind. 508, 55 N. E. 434; *Rhodes v. Webb-Jameson Co.* (1897), 19 Ind. App. 195, 49 N. E. 283; *Combs v. Bays* (1897), 19 Ind. App. 263, 49 N. E. 358.

It will be observed, however, that the certificate itself makes provision with reference to the effect of giving a note for a premium. This provision is set out in full, *supra*, and by reference it will be seen that it denominates payment of a premium by note as an *attempted* payment. Such designation clearly indicates that the parties to such certificate agreed at the time of its execution that any payment of a premium by note should not be an absolute payment, but an *attempted* payment, which should only become effective to discharge such premium when the note was paid. Such

provision therefore must be read in connection with every note given for a premium under such certificate, as it determines the character of such payment, in the absence of a subsequent agreement to the contrary. When this is done, it is at once manifest that such note was intended as a conditional payment only, as the provision not only characterizes such note as an *attempted* payment, but it also stipulates that its non-payment will cause the certificate to lapse in the same manner as a failure to pay a premium. It therefore follows that such note must be construed to be a conditional payment only, unless there was some evidence that it was accepted as absolute payment of the premiums for which it was given.

Counsel for appellee insist that the receipt given by appellant's secretary to the insured on February 4, 1913, at the time the note in question was executed, is evidence of such fact, but we do not so construe it. A comparison of this receipt with the remaining seven premium receipts introduced in evidence will disclose that this is the only one that states that a note was received for dues. All the others simply acknowledge the receipt of a specific sum of money for the dues for various quarters. The insertion of the word "note" in this particular receipt is significant, and clearly indicates that it only purported to acknowledge the receipt of a note for the dues for the quarter ending April 1, 1913. Such receipt of itself therefore cannot be said to be evidence of an absolute payment of the premium for the period indicated, since it merely acknowledges the receipt of a note, which the certificate designates in effect as a conditional payment only. On the other hand, there was testimony from the witness who represented appellant in the acceptance of the note to the effect that the insured said in substance at the time he executed the note, that he was not prepared to pay his

premium, and would like to have an extension of time for such purpose; that nothing was said with reference to the note being received in payment of the premiums, and that he took it as a matter of extension of time. As this was all the evidence bearing on this question, we conclude that no agreement was made whereby the note in controversy was to be accepted by appellant otherwise than as provided in the certificate in suit, and hence such note was not taken as an absolute payment of such premiums, but as a conditional payment only, and the failure to pay such note was in effect a failure to pay such premiums.

The case of *Union, etc., Ins. Co. v. Adler, supra*, fully supports the conclusion we have reached. In that case the provision for the lapsing of the policy was in the premium note itself. The court, in discussing the effect of such provision, said on page 539: "The note in question specifies that it is given on account of the policy, and unless paid when it becomes due such policy lapses as for nonpayment of premium when due. It is thus expressly agreed that the note was not accepted as payment. The payment of the note is made the test of the final payment of the premium. The failure to pay the note may not, in the absence of a provision in the policy for a forfeiture, work a forfeiture, yet it cannot be fairly held to have kept the policy alive as a payment. The decedent was bound by the entire note. Whatever right it gave him upon its execution was lost by its very terms by his failure to pay it at maturity. He could gain nothing by his own default." But it

has been contended that such provision must be

4. contained in the note itself, and not in the policy alone, in order to effect such result, and for that reason the case cited and quoted is not applicable here. We do not concur in this contention. Reason does not seem to require such distinction, and the

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authorities are to the contrary. 25 Cyc 826; 3 Cooley, Briefs on Ins. 2269; 2 Bacon, Life and Acc. Ins. (4th ed.) §475; *Imperial Life Ins. Co. v. Glass*, 96 Ala. 568, 11 South. 671; *Sullivan v. Connecticut, etc., Assn.* (1897), 101 Ga. 809, 29 S. E. 41; *McIntyre v. Mich. State Ins. Co.* (1883), 52 Mich. 188, 17 N. W. 781; *Behling v. Northwestern, etc., Ins. Co.* (1903), 117 Wis. 24, 93 N. W. 800; *Nat. Life Assn. v. Brown* (1897), 103 Ga. 382, 29 S. E. 927; *Leeper v. Franklin Life Ins. Co.* (1902), 93 Mo. App. 602; *Union, etc., Ins. Co. v. Hughes* (1902), (Tex.) 70 S. W. 1010; *Union, etc., Ins. Co. v. Duvall* (1894), 16 Ky. Law 398; *Muhleman v. Nat. Ins. Co.* (1873), 6 W. Va. 508; *Iowa Life Ins. Co. v. Lewis* (1902), 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204. We therefore conclude that the insured was in default in payment of premiums at the time of his death.

Appellee contends, however, that the provision we have been discussing has no application to the certificate in suit, as it was more than two years old

5. at the time of the insured's death. It bases this contention on the provision of the certificate set out in full, *supra*, which provides that it shall be incontestable after two years from its date, except for nonpayment of premium and violation of conditions relating to naval and military service in time of wars. It insists that the acceptance of the note in question was an absolute payment of the quarterly premiums for which it was given; that to permit the payment of such certificate to be contested after two years from its date, on the ground of the nonpayment of the note, would be to violate the incontestable provision of the certificate just stated, and therefore the only construction which will give force and effect to the provisions of both and avoid a conflict is to construe the provision for the lapsing of a certificate for the nonpayment of

a note, as applying to such certificates only as have run less than two years from their date, and the incontestable provision as applying to all other certificates. We do not concur in this contention. The construction we have placed on the acceptance of such note renders it unnecessary to limit the provision with reference to the lapsing of certificates for the nonpayment of a note given for a premium to the first two years of its life, as contended by appellee, in order to avoid a conflict with the incontestable clause. It treats the acceptance of such note, under the provision of the certificate and the by-law, simply as an extension of time for the payment of the premiums for which it was given, and a failure to pay such note as a failure to pay such premiums. In such event one of the excepted conditions provided in the incontestable clause arose and became available as a defense. *Union, etc., Ins. Co. v. Adler, supra*; *Union, etc., Ins. Co. v. Whetzel* (1902), 29 Ind. App. 658, 65 N. E. 15.

But there is in fact no real conflict between such incontestable clause, and the provision in the certificate and by-law with reference to the effect of the

6. nonpayment of a note given for a premium.

Under the rule governing the construction of contracts we are required to construe the certificate as a whole. Such rule requires that every clause, and even every word of a contract should, when possible, have assigned to it some meaning, and a harmonious whole be made to appear, for plainly the parties so intended, since it will not be presumed that they wilfully inserted a mere idle provision. *Irwin v. Kilburn* (1885), 104 Ind. 113, 3 N. E. 650; *Warrum v. White* (1908), 171 Ind. 574, 86 N. E. 959; *Nave v. Powell* (1912), 52 Ind. App. 496, 96 N. E. 395; *Kann v. Brooks* (1913), 54 Ind. App. 625, 101 N. E. 513.

When this is done the apparent conflict for which ap-

pellee contends disappears. It will be observed that what is called the incontestable clause provides

7. in substance that such certificate shall be incontestable after two years from its date, except for nonpayment of any premium, and violation of conditions relating to naval and military service, while the alleged conflicting forfeiture clause provides, in substance, for the lapsing of a certificate where a note given in payment of premium is not paid at maturity. Construing these two provisions together, as we are required to do under the rule stated, and omitting any reference to naval and military affairs, their real meaning is expressed in a single sentence as follows: "This certificate shall be incontestable after two years from its date, except for nonpayment of any premium," but if a note be given in payment of a premium, and it is not paid at maturity, this "certificate shall lapse in the same manner as it would had the payment not been attempted." This gives full force and effect to both provisions of the certificate concurrently, without doing violence to either, and is a fair and reasonable construction of each. It therefore follows that, even if we had accepted appellee's contention that the note in question was executed as an absolute payment of such premium, the incontestable clause would not have afforded any relief from the effect of its nonpayment. But appellee insists that the by-law which provides that a certificate will lapse if a note given in payment of a premium is not paid at maturity is not enforceable.

8. It bases this contention on the fact that the provision in the application making a compliance with the by-laws of appellant binding on either the insured or his beneficiary stipulates in substance that the insured or his beneficiary surrenders all right of recovery under such certificate on the violation of any of the conditions of such by-laws. The claim is made that the

use of the word "or" in such provision renders it uncertain as to whether it was intended that the insured or his beneficiary shall suffer a forfeiture by reason of any such violation, and that, by reason of this fact, the provision under consideration is too indefinite to be enforced as the basis of a forfeiture not favored in law. Without entering into a discussion of the various meanings of the word "or" when used in different relations, as disclosed by the authorities, or conceding that a proper construction of the word as here used produces uncertainty, it will suffice to say that the same provision contained in the by-laws with reference to the non-payment of a note given in payment of a premium is also contained in the certificate itself, and hence the result would be the same regardless of the contention of appellee as stated.

Appellee further contends that appellant cannot urge as a defense to this action that the certificate in suit lapsed because of the nonpayment of the note in

9. question, for the reason that there is no allegation or proof that such note was tendered back to the insured, or tendered to his personal representative, or to the beneficiary or any one else; that the retention of such note was in effect an election to waive any such forfeiture, and to treat such certificate as valid. She bases this contention on the well-established rule that the breach of a condition in an insurance contract does not render such contract void, but voidable only, at the election of the insurer, and that, in order for an insurer to avoid such contract, it must show a seasonable return of the premium received thereunder. In the cases cited in support of this rule premiums had been received subsequently to the broken condition and prior to the insurer's discovery thereof, and it was a return of such premiums so received that it was held

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necessary to return on an election to avoid such contracts of insurance. We do not question the application of the rule under such a state of facts, but in the instant case the facts are so far different as to render the rule stated and the authorities cited inapplicable. In this case nothing whatever was received under the certificate subsequently to the happening of the event that worked a forfeiture thereof, and hence there was nothing which the insurer was required to return in order that the forfeiture might be effective. In cases of this kind the authorities hold that, in the absence of a provision to the contrary, it is not necessary for an insurer to do any affirmative act in order to avoid liability under a certificate of insurance which provides that the right of the insured under it shall be forfeited on a failure to pay the premium therefor, or any note given for such premium. *Grand Lodge, etc. v. Marshall* (1903), 31 Ind. App. 534, 68 N. E. 605, 99 Am. St. 273; *Brooks v. Conservative Life Ins. Co.* (1906), 132 Iowa 377, 106 N. W. 913, 119 Am. St. 560, 11 Ann. Cas. 339, 340; 3 Cooley, Briefs on Ins. 2277; 25 Cyc 828; 2 Bacon, Life and Acc. Ins. (4th ed.) §476; Vance, Ins. 235; 19 Am. and Eng. Ency. Law 47; *Supreme Council, etc. v. Grove* (1911), 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913; *Iowa Life Ins. Co. v. Lewis, supra*; *In re Attorney-General v. Continental Life Ins. Co.* (1883), 93 N. Y. 70; *Roehner v. Knickerbocker Life Ins. Co.* (1875), 63 N. Y. 160; *Sovereign Camp, etc. v. Hicks* (1904), 37 Tex. Civ. App. 424, 84 S. W. 425.

However, it has been uniformly held that a provision in a certificate for forfeiture, on the nonpayment of a premium or a premium note, being for the

10. benefit of the insurer, may be waived by it. *Willcuts v. Northwestern, etc., Ins. Co.* (1882), 81 Ind. 300; *Phenix Ins. Co. v. Tomlinson* (1890), 125 Ind. 84, 25 N. E. 126, 9 L. R. A. 317, 21 Am. St. 203; *Michi-*

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gan, etc., Ins. Co. v. Custer (1891), 128 Ind. 25, 27 N. E. 124; *Supreme Tribe, etc. v. Hall* (1899), 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. 262; *Prudential Ins. Co. v. Sullivan* (1901), 27 Ind. App. 30, 59 N. E. 873. We must therefore examine the record and

9. ascertain if there was any evidence from which the jury might have found that such forfeiture had been waived by appellant. It is claimed that the mere retention of such note was evidence of such fact. The authorities lead us to a different conclusion. They hold that the mere retention of such a note does not furnish ground for presuming or inferring a waiver of the conditions upon which it was given and accepted, as such act is not inconsistent with the assertion of forfeiture; that such note may be held by the insured merely as evidence of its nonpayment, and therefore such act is in harmony with a claim of forfeiture, and of itself furnishes no evidence of waiver. On the other hand, it is held that, if the insurer retains such note as an evidence of indebtedness still due it, such act will constitute a waiver of the right to claim that the certificate under which it was executed has been forfeited by reason of its nonpayment, and an attempt to collect the same after the right to a forfeiture has accrued is evidence of such waiver. *New York Life Ins. Co. v. Evans* (1910), 136 Ky. 391, 124 S. W. 376; *Parker v. Bankers' Life Assn.* (1899), 86 Ill. App. 315; *Union, etc., Ins. Co. v. Spinks* (1904), 119 Ky. 261, 83 S. W. 615, 84 S. W. 1160, 69 L. R. A. 264, 7 Ann. Cas. 913; *How v. Union, etc., Ins. Co.* (1880), 80 N. Y. 32; *New York Life Ins. Co. v. Warren Deposit Bank* (1903), (Ky.) 75 S. W. 234; *Rhodes v. Royal Union, etc., Ins. Co.* (1914), 56 Pa. Super. Ct. 233; *Sharpe v. New York Life Ins. Co.* (1904), (Neb.) 98 N. W. 66; *Moreland v. Union, etc., Ins. Co.* (1898), 20 Ky. Law 432, 46 S. W. 516; *Union, etc., Ins. Co. v. Duvall* (1898), 20 Ky. Law

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441, 46 S. W. 518; *Manhattan Life Ins. Co. v. Savage's Admr.* (1901), (Ky.) 63 S. W. 278.

In this case there is no evidence whatever of any effort on the part of appellant to collect the note in question, or to assert it as an obligation against the insured or his estate, or any one else, after its maturity and the thirty days of grace allowed for its payment. It was silent and passive in that regard, which is wholly consistent with a rightful retention of such note under a claim that the certificate had lapsed by reason of its nonpayment. But beyond this there is undisputed evidence that appellee, subsequently to the death of the insured, offered to pay the note, but payment was refused by appellant. Under such circumstances no presumption of waiver would arise, and no such inference could be properly drawn from the mere retention of the note.

It has been urged that the conduct of appellant with reference to certain commissions on business procured by its agent King with the assistance of the in-

11. insured afforded some evidence of a waiver of such forfeiture. The uncontradicted evidence on this subject, in substance, is as follows: Appellant had in its employ as a soliciting agent one King, who engaged the insured as an assistant in soliciting among his acquaintances. King was to receive as his commission sixty per cent. of the first premium on each certificate issued on an application procured by him, and he agreed to give the insured in payment of his services twenty-five per cent. of such commission on all business secured with his assistance. King requested the secretary of appellant to keep a memorandum of the business secured with the assistance of the insured and the amount of his commission to which the insured was entitled under such agreement. Thereafter King would report to the secretary of appellant from time to time such

business as was secured with his assistance, and such secretary, for the convenience of said King and the insured, opened a memorandum account on the books of the company in pursuance of the request of said King showing such business and the amount due the insured from King's commissions on account thereof. At times certificates were issued, on applications secured by King with the assistance of the insured, where notes were taken for the first premium out of which the commission was payable. In such cases no commission was due from appellant to King, and nothing was due from King to appellant on such business until such notes were paid, but the amounts due each in the event such notes were paid were entered at the time of issuing such certificates, and if such notes were not paid, such amounts were charged off without payment. On April 5, 1913, the date on which the days of grace for the payment of the note in question expired, there were no unpaid commissions due the insured, and none in which he had any contingent interest. This status so remained until April 17, 1913, when a certificate was issued to John T. Boswell on an application secured by King with the assistance of the insured. The first premium on such certificate was not paid in cash, but two notes were taken therefor, which were paid in July and December, 1913, respectively. The amount due the insured from King's commission contingent on the payment of said notes was \$8.96. An entry of two items of \$4.48 each was made on the memorandum account kept by the secretary of appellant at the request of said King on the date said certificate was issued as a memorandum of the amount that would be due the insured from the commission of said King on the payment of such notes. This account so remained until April 30, 1913, when the total of these items was transferred from said memorandum account to said King's account,

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from which it was originally taken, and such memorandum account was thereby closed. The amounts entered in such account in favor of the insured were paid to him from time to time by the directions of said King. Such payments were made at times by issuing to the insured receipts for his quarterly premium on the certificate in suit, if any such premium was then due, and, if not, then such payments were made in cash.

It is urged that the foregoing facts afford some evidence from which the jury might have found that appellant waived the forfeiture provided by the terms of the certificate for the nonpayment of the note or the quarterly premiums covered thereby. An approved definition of waiver reads as follows: "Waiver is

where one in possession of any right, whether

12. conferred by law or by contract, and with full knowledge of material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it, thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards." *Shedd v. American Credit, etc., Co.* (1911), 48 Ind. App. 23, 95 N. E. 316; *Ohio, etc., Buggy Co. v. Anderson Forging Co.* (1907), 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas.

1045. We have examined with care that part of

11. the record by which such uncontradicted facts are established, and have not been able to find any evidence that tends to prove that appellant had done or had forborne the doing of anything inconsistent with its right of forfeiture.

It will be observed that there were no commissions, either immediate or contingent, due the insured at the time fixed for such certificate to lapse by reason of the nonpayment of the note in question. The whole transaction with reference to the Boswell certificate, on which the claim for commission is based, arose subse-

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quently thereto. Such certificate was not issued until twelve days later. Notes were given for the first premium which were not paid until July and December afterwards, and hence the insured's commission on that account remained contingent until such time. True, appellant's secretary at the time such certificate was issued entered on the memorandum account which he kept at King's request the amount to which the insured would be entitled from King's commission on the payment of such notes, but this in no way bound appellant for the payment thereof unless and until such notes were paid. It has been held that the fact that there were wages due an insured from the insurer at the time of his default in the payment of an assessment sufficient to pay the same will not prevent a forfeiture for nonpayment, as the insurer is under no duty to apply such wages to the payment of the assessment, in the absence of an agreement so to do. 21 Am. and Eng. Ency. Law 291; *Willcutts v. Northwestern, etc., Ins. Co.*, *supra*; *Caywood v. Supreme Lodge, etc.* (1908), 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. 253, 17 Ann. Cas. 503; *Pister v. Benefit Assn.* (1896), 3 Pa. Super. Ct. 50; 3 Cooley, Briefs on Ins. 2325. In this case there was no evidence of any agreement that the insured's commissions should be applied in payment of his premiums or the note in question, and nothing from which such authority could be properly inferred. Hence the fact that appellant's secretary subsequent to the death of the insured transferred such amount from the memorandum account to King's account from which it originally came has no significance. If it had remained in such memorandum account, appellant would not have been required to apply it on said note in the absence of an agreement to that effect. The fact that such commissions had been previously applied by the insured in the payment of his premium will not author-

ize an inference that an agreement existed for future applications. But even if it were possible to draw such inference as to any commissions due within the period of grace allowed for the payment of premiums, certainly we could not go beyond this and infer the existence of an agreement that appellant should not allow such certificate to lapse, but should hold it in abeyance, awaiting the accumulation of commissions with which to pay such premiums. The conduct of both appellant and the insured during previous years in regard to the payment of such premiums, the lapsing of such certificate, and the reinstatement of the same forbids such an inference. We are therefore firm in our conviction that the evidence discloses nothing with reference to the commissions of the insured to indicate a waiver of the right of forfeiture by reason of the nonpayment of such note.

But it is contended that the conduct of appellant in allowing the insured to pay his premiums from accumulated commissions and accepting such pre-

13. miums after their maturity had led him to believe that such course would be continued, and his certificate would not be lapsed on account of default in such payment; that the insured was thereby lulled into a sense of security in that regard, and for that reason appellant is now estopped from asserting a forfeiture on account of the nonpayment of the note in question. We recognize the rule that an insurance company will be estopped to insist upon a for-

14. feiture if by any agreement either expressed or implied by the course of its conduct, it leads the insured honestly to believe that his premiums will be received after the appointed day. *Workingmen's, etc., Assn. v. Leverton* (1912), 178 Ind. 151, 98 N. E. 871; *Majestic Life, etc., Co. v. Tuttle* (1914), 58 Ind. App.

98, 107 N. E. 22. It is not claimed in the instant

13. case that there was any expressed agreement to

that effect, but it remains to be seen if there was any such implied agreement. The certificate in suit was issued on May 30, 1910. The quarterly premiums thereon fell due on the first days of January, April, July, and October of each year. Twelve quarterly premiums thereon matured prior to the execution of the note in question. We assume that the first quarterly premium was paid in cash at the time the certificate was issued. If so, the history of the payment of these premiums is as follows: Three were paid in cash; one was paid partly in cash and partly in commission; six were paid entirely by commissions; and two were extended by the execution of notes and never paid. Seven were paid within the period of grace allowed, and of those not so paid, one was only a single day and another only five days beyond such period. The last quarterly premium paid by commissions was the one falling due on January 1, 1912. Thus it clearly appears that there was no uniform custom of paying such premiums in commissions, or beyond the period of grace. Of the five occasions on which such premiums were not paid within the period of grace, there is direct and undisputed evidence of a forfeiture of the certificate on two of such occasions. On these two occasions the insured was required to furnish a certificate of good health in strict compliance with the provision for reinstatement. One of such certificates is in evidence, and we note that the insured states therein over his own signature as follows:

"I, Grant Mason of Princeton, State of Indiana, having lapsed my membership in the Farmers and Merchants Mutual Life Association, Princeton, Indiana, and desiring to be reinstated therein, do declare, guarantee and warrant, etc."

Thus he was made keenly conscious of the fact that his certificate was being lapsed by appellant for the nonpayment of his premiums. The evidence also dis-

closes that the insured had not paid any of the premiums which accrued on his certificate during the last fifteen months of his life in commissions. Two of such premiums had been paid in cash, viz.: those falling due on the first days of April and July, 1912. The three premiums subsequently falling due were never paid. In fact, the last insurance written prior to the expiration of the thirty days of grace allowed for the payment of the note in question, from which the insured was entitled to a commission, as appears from the memorandum account kept by the secretary of appellant at King's request, was in July, 1911. Such commissions were evidently exhausted in paying the quarterly premium due on his certificate on January 1, 1912. Thereafter his premiums were either paid in cash or were never paid. It is therefore quite manifest that the insured was not relying on his commissions for the payment of his premiums. It is equally as manifest that he was not honestly relying on a belief that his certificate would not be lapsed if he defaulted in the payment of his premiums, in view of the fact that he was required to give the good health certificate necessary for reinstatement after he had defaulted in the payment of his two quarterly premiums, maturing immediately preceding the last default, to wit: on July 1 and October 1, 1912. Under these facts there is no ground for indulging an inference that appellant by its course of conduct had led the insured to forego prompt payment of his premiums on the belief that his certificate would not lapse thereby, and thus lulled him into a sense of security notwithstanding such defaults. Moreover, it has been repeatedly held that occasional

15. voluntary indulgence on the part of an insurance company, in the absence of an express or implied agreement to waive payment of assessments according to the conditions of the contract, cannot be justly con-

strued as a permanent waiver, or as depriving the company of the right to insist upon a forfeiture, or to cancel its policy on account of the failure to pay according to the stipulations therein written. *Sweetser v. Odd Fellows, etc., Assn.* (1889), 117 Ind. 97, 19 N. E. 722; *Supreme Lodge, etc. v. Hahn* (1908), 43 Ind. App. 75, 84 N. E. 837; *Thompson v. Insurance Co., supra*; *Easley v. Valley Mut. Life Assn.* (1895), 91 Va. 161, 21 S. E. 235; *Thompson v. Insurance Co.* (1906), 116 Tenn. 557, 92 S. W. 1098, 6 L. R. A. (N. S.) 1039, 115 Am. St. 823.

Our attention has been called to the rule of law that forfeitures are not looked upon with favor. We recognize the force and reason of such rule, but it has

16. been repeatedly held that courts cannot avoid enforcing them when the party by whose fault they are incurred cannot show some good ground in the conduct of the other party on which to base a reasonable excuse for the default. *Grand Lodge, etc. v. Marshall, supra*; *Union, etc., Ins. Co. v. Adler, supra*; *Public Savings, etc., Co. v. Coombes* (1915), 59 Ind. App. 523, 108 N. E. 244; *Thompson v. Insurance Co., supra*. We are not at liberty, therefore, to arbi-

13. trarily ignore the plain provision of the certificate in suit with reference to its forfeiture for nonpayment of premiums due thereon, or of a note given therefor. No valid excuse has been given for the admitted default in such payment, and hence we must give effect to such provision. However, if it could be said that the facts stated, or any other facts which the evidence tended to prove, are sufficient to justify the jury in finding that appellant had waived the forfeiture in question, still the result of this appeal would not be changed in view of other errors hereinafter indicated.

Appellant urges other errors in its motion for a new trial, one of which is based on the action of the court

in admitting in evidence the post card sent to
17. the insured on March 13, 1913, notifying him of the maturity of his quarterly premium on April 1, 1913. If the contents of the post card were admissible for any purpose, the action of the court was not error. One of the questions that the jury had to determine was whether the certificate in suit had lapsed prior to April 1, 1913, and had been reinstated by the acceptance of the note in question. In order to reinstate such certificate, if it had lapsed, the insured was required to furnish appellant a satisfactory certificate of good health. This requirement, however, could be waived. There is no evidence that any health certificate was furnished at the time of the acceptance of such note, or at any subsequent time. We are therefore of the opinion that the contents of such post card could properly be considered by the jury on the question of such waiver, and hence there was no error in its admission.

Another alleged error asserted by appellant in its motion for a new trial is based on the action of the court in admitting in evidence certain receipts
18. executed by appellant showing the payment by the insured of a number of quarterly premiums prior to the execution of the note in question. We do not consider the admission of such receipts error. They tended to support the allegation of the complaint that the insured had performed all the conditions of the certificate on his part to be performed. The fact that such allegation might have been proven otherwise or by less evidence did not render their admission error.

Appellant also predicates error on the action of the court in giving instruction No. 12 at the request of appellee. This instruction informed the jury, in
19. effect, that, if it found that the insured executed the note of February 4, 1913, as payment of all premiums then owing on the certificate in suit up to

April 1, 1913, and that appellant accepted such note as such payment, appellee was entitled to recover, and its verdict should be in her favor. This instruction was evidently drawn on the theory that the provision in the certificate and by-laws with reference to the effect of the nonpayment of a note given appellant in payment of money due it applied only during the first two years of the life of such certificate, by reason of the provision that it should be incontestable after two years from its date, except for nonpayment of premium and violation of conditions as to naval and military service in time of wars. This is a theory for which appellee contends, but in which we do not concur as indicated, *supra*. Under the construction we have hereinbefore given such provisions when considered together, such certificate lapsed in the absence of proof of a waiver, regardless of whether such note was accepted as absolute or conditional payment of the quarterly premiums it covered. This was true, because under such construction a certificate lapsed not only on failure to pay a premium, but also on failure to pay a note given for premium within the period of grace allowed therefor. It was therefore error to instruct the jury that it should return a verdict for appellee if they found that the note in question paid all premiums to April 1, 1913, as it wholly ignored the fact that such certificate might lapse if such note was not paid at its maturity, or within thirty days thereafter. Appellant also insists that the court erred in giving instruction No. 13 at the request of appellee. By this instruction the jury was

20. told in effect that the acceptance of the note in question kept the certificate in suit in full force up to the quarter beginning April 1, 1913, and that, if the certificate was in full force and effect on said date, the insured had the right, so far as the payment of pre-

mium thereon was concerned, to keep it alive and secure against lapsing by paying another quarterly premium any time within the month of April, 1913. This was clearly error. It proceeds upon the theory that the giving of the note in question was an absolute payment of the premiums for the two quarters ending March 31, 1913, and therefore such quarterly premiums were fully discharged, regardless of whether such note was ever paid or not. In the earlier part of this opinion we have held that such theory could not be sustained under the evidence, and hence an instruction drawn on such theory is manifestly erroneous. Under our construction of the certificate and the effect of the acceptance of such note, there were two conditions on which such certificate could lapse after April 1, 1913. One was by a failure to pay the premium for the current quarter beginning on said date within such month, and the other was by a failure to pay the note given as conditional payment of the premiums for the two previous quarters within the period of grace expiring on the fifth day of such month, which was in effect a failure to pay such premiums. The instruction wholly ignored the possibility of the certificate lapsing on the happening of the last-named contingency, and hence the giving of it was error.

Appellant urges other alleged errors, but as such questions will probably not reoccur on another trial, in view of the matters determined by this appeal, we will not give them further consideration here. Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for such further proceedings as are not inconsistent with this opinion.

NOTE.—Reported in 116 N. E. 852. Insurance: (a) acceptance of note for premium, 1 Ann. Cas. 967, 25 Cyc 752; (b) forfeiture of policy for nonpayment of premium when insurer is indebted to insured, 17 Ann. Cas. 506; (c) construction of contract for-

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feiture, 25 Cyc 740; (d) nonpayment of premium note, forfeiture, waiver, 25 Cyc 858, 870; acceptance of overdue premiums by company, effect, 57 Am. Rep. 515.

PERE MARQUETTE RAILROAD COMPANY v.
CHADWICK.

[No. 9,232. Filed April 8, 1917. Rehearing denied
June 21, 1917.]

1. **DEATH.—Action by Father for Death of Child.—Pleading.—Complaint.**—In an action by a father against a railroad company for the death of a minor child, a complaint alleging that plaintiff, his wife and children resided in property owned by the wife, that defendant created a nuisance in proximity to plaintiff's home by depositing putrid and decaying offal on its right of way, and that the death of the child was caused by the unwholesome and poisonous vapors generated by such nuisance, and praying a recovery only for the loss of the child's services and for the expenses of last illness, states a cause of action for wrongful death, and not for damage to the realty owned by the wife, the allegations as to ownership being merely for the purpose of explaining the rightful presence of plaintiff and his child on the premises. p. 97.
2. **DEATH.—Death of Minor Child.—Father's Right to Sue.**—Although a father and son reside in property owned by the wife, the father can maintain an action, independently of any right to recover for damage to property, for the death of a minor son caused by a nuisance maintained near the dwelling house. p. 99.
3. **DEATH.—Action.—Nuisance.—What Constitutes.—Statutes.**—Although an action for wrongful death caused by a nuisance is not predicated upon §291 Burns 1914, §289 R. S. 1881, defining a nuisance, the statutory definition, which is broader than the common-law definition and includes, in addition to damage to property, injury to life, is applicable in determining what constitutes a nuisance. p. 101.
4. **DEATH.—Death of Minor Child.—Elements of Damage.**—In estimating the damages of a parent for the death of his minor child, the value of the services of the child from the time of the injury until he becomes of age, less the cost of his support and the expense caused the parent because of the injury and death, should be considered. p. 101.

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5. **NEW TRIAL.**—*Grounds.*—*Excessive Damages.*—In an action for wrongful death, where there is some evidence to warrant the amount of recovery, and nothing to indicate that the jury acted from prejudice, partiality or corruption, it was not error for the trial court to deny new trial on the ground of excessive damages. p. 101.

From Marshall Circuit Court; *Smith N. Stevens*, Judge.

Action by George Chadwick against the Pere Marquette Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

E. D. Crumpacker, Grant Crumpacker, O. L. Crumpacker and Adam Wise, for appellants.

Theron F. Miller, for appellee.

IBACH, P. J.—The complaint in this case charges that the plaintiff's wife is the owner of certain described real estate in Michigan City, Indiana, which was occupied by plaintiff, his wife and two sons. On May 15, and on other days following, defendant deposited on its right of way, at a point about 200 yards from such dwelling house, large quantities of putrid, decomposed and decaying manure and offal, and allowed it to remain there for a long period of time. Thereby a nuisance was created from which unhealthful, offensive and noxious odors and vapors were generated and emitted so that the air in and around such premises became and was during all the time aforesaid infected with poisonous matter and rendered unwholesome and unhealthful. During the month of August, 1909, one of plaintiff's sons became sick and, because of such nuisance and the unwholesome odors and vapors which were generated and emitted by the said nuisance, as aforesaid, he was prevented from regaining his health and he remained sick from that time until he died of tuberculosis December 11, 1910. The minority of appellee's son, his ability to earn money, and the amount of ex-

pense necessarily incurred by appellee in his efforts to cure his son are also averred. It is for the loss of the son's services and these expenses that he seeks recovery. The complaint was answered by a general denial. Trial was had, resulting in verdict and judgment for appellee for \$1,250.

We have carefully read all the evidence produced at the trial, and we conclude that it tends to prove that appellee was the father of the deceased minor child; that such child was by reason of his sickness unable to perform any labor subsequently to December, 1909. Prior thereto he was earning \$1.75 per day. The expense of supporting such child was from \$100 to \$150 each year. The expense for medicines and medical care and in sending him to the State of California for the betterment of his health was \$1,000. That appellee and his son at the time of the commission of the acts complained of was residing on the lands described in the complaint; that the acts charged in the complaint were committed by appellant and that they affected the minor son of appellee so as to interfere with and prevent his recovery; and that the things done by appellant which amounted to the commission of a nuisance were continued by appellant after notice had been given to it of the effects of such acts upon appellee's family, including his said son.

Appellant in its motion for a new trial insists that the verdict of the jury is not sustained by sufficient evidence and is contrary to law. In support of

1. these contentions it is urged that the theory of the complaint is that of an invasion of, and injury to, the property rights of appellee's wife; that such facts appear from the complaint itself and the evidence so shows; consequently appellee is in no position to maintain this suit.

Such contention would undoubtedly be correct if the prominent and controlling facts averred in the complaint supported appellant's position, and such theory was the one adopted by the trial court. It will be conceded that there are some averments in the complaint with reference to the ownership of the real estate and occupancy thereof which are unnecessary except for the purpose of explaining the rightful presence of appellee and his son at that particular place, and this it would seem was the only purpose of such averments, as the plaintiff does not allege any damage or injury to the real estate or ask to recover damages on account thereof. Such averments are consistent with, and we are inclined to concur in, the claim made by appellee that the suit is one for damages sustained by the father, who was rightfully present with his son on the particular premises described in the complaint, for the death of his son, not primarily because of any injury to the real estate, or a diminution of the rental value thereof, or for any interference with the comfortable enjoyment of the premises described, treating his injury as an incident thereto, but rather that the damages suffered were different in kind from those suffered by the owner of the property and wholly disassociated therefrom, not merely incidental but direct and positive, occasioned by the wrongful acts of appellant which constituted a nuisance.

Section 267 Burns 1914, §264 R. S. 1881, provides in part: "A father (or in case of his death, or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child * * *." Except as provided in such statute the father, when living, is the only person who may maintain an action for the injury or death of his minor child. *Louisville, etc., R. Co. v. Lohges* (1892), 6 Ind. App. 288, 33 N. E. 449; *Chicago, etc., Stone Co. v. Nelson*

Pere Marquette R. Co. v. Chadwick—65 Ind. App. 95.

(1903), 32 Ind. App. 355, 69 N. E. 705; *Berry v. Louisville, etc., R. Co.* (1891), 128 Ind. 484, 28 N. E. 182.

Appellant has not cited, neither have we been able to find in this state, a single case wherein the identical question has been considered; and, where kindred

2. questions have been considered by the courts of other states, we find much confusion, both in the discussion and results reached. We conclude, however, from the examination we have made of the better-reasoned decisions in which a kindred principle has been involved that an independent action such as we have before us can be maintained and such is the apparent theory upon which this case proceeded throughout the trial. To hold otherwise would be to deny the father the right to recover the damages sustained by him on account of the wrongful death of his minor child occasioned by a nuisance created and maintained by appellant. In support of our conclusion see *Hosmer v. Republic Iron, etc., Co.* (1913), 179 Ala. 415, 60 South. 801, 43 L. R. A. (N. S.) 871, and note; *Fort Worth, etc., R. Co. v. Glenn* (1904), 97 Tex. 586, 80 S. W. 992, 65 L. R. A. 818, 104 Am. St. 984, 1 Ann. Cas. 270; *Shelby Iron Co. v. Greenlea* (1913), 184 Ala. 496, 63 South. 470; *Flynn v. Butler* (1905), 189 Mass. 377, 75 N. E. 730; *Wesson v. Washburn Iron Co.* (1866), 13 Allen (Mass.) 95, 90 Am. Dec. 181; *Fisher v. Zumwalt* (1900), 128 Cal. 493, 496, 61 Pac. 82; *Corely v. Lancaster* (1883), 81 Ky. 174.

In *Hosmer v. Republic Iron, etc., Co.*, *supra*, the court said: "It is obvious that to maintain an action for an injury affecting the value of the freehold the plaintiff must have a legal estate. But if noxious vapors and the like cause sickness and death to one who has a lawful habitation in the neighborhood, no sufficient reason is to be found in the accepted definitions of nuisance, nor in that policy of the courts which would discourage

vexatious litigation, nor in the inherent justice of the situation, as we see it, why the person injured, or his personal representative in case of death, should not have reparation in damages for any special injury he may have suffered, although he has no legal estate in the soil. Certainly a child has the right to live under his father's roof—is a lawful occupant of his father's home—and in our opinion he should be accorded the same measure of protection against the construction of nuisances in the neighborhood which are so noxious and long-continued as to materially affect his physical well-being."

In the case of *Fort Worth, etc., R. Co. v. Glenn, supra*, the court said: "If a suit be brought for an injury to real estate caused by a nuisance it is clear that the plaintiff must show that he has some right which has been injuriously affected. If the damage be to the right of those occupying the property at the time, he must prove title, or at least a right of occupancy. If it be of such permanent character as to cause damage to an estate in reversion or remainder, the reversioner or remainderman, if he sue, must prove his title as such. But why should the owner of a house be allowed to recover damages for being made sick by a nuisance created in the vicinity thereof, and another lawful occupant be denied a remedy for a like reason? * * * It seems to us that a conflict of opinion upon this question has arisen from confusing the damage which results to property from a nuisance, with that special damage, such as sickness, which may result to an individual from a nuisance either public or private."

While in the present case the property was owned by the mother and occupied by the father and son by what may be termed mere sufferance, the principle announced in the above cases is applicable to the facts of this case.

Although this action is not predicated on the statute

(§291 Burns 1914, §289 R. S. 1881), such statute is looked to for a definition as to what constitutes

3. a nuisance. Said section provides: "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." So far as necessary to this case such statute may well be read: Whatever is injurious to health, or offensive to the senses, so as essentially to interfere with the comfortable enjoyment of life is a nuisance, and the subject of an action.

The definition which our legislature saw fit to enact as to what shall constitute a nuisance is broader than the common-law definition of nuisance, and, in addition to injury to property, includes also injury to life. In states having similar statutes the decided cases recognize that such definition would authorize an independent action for damages such as we have here without regard to any legal or proprietary interest in the real estate. See *Fisher v. Zumwalt*, *supra*; *Hosmer v. Republic Iron, etc., Co.*, *supra*.

Appellant finally claims that the damages are excessive. In estimating the damages of a parent for the death of his minor child, the value of the serv-

4. ices of the child from the time of the injury until he would have arrived at full age, less the cost of his support and the expenses caused the parent because of the injury and death, should be considered. *Pennsylvania Co. v. Lilly* (1881), 73 Ind. 252; *City of Elwood v. Addison* (1900), 26 Ind. App. 28, 59 N. E. 47:

There was some evidence to warrant the amount

5. of the recovery under the rule above stated and nothing to indicate that the jury acted from prejudice, partiality or corruption; therefore the court did not err in refusing a new trial on the ground of ex-

cessive damages. *Creamery, etc., Mfg. Co. v. Hotsenpiller* (1902), 159 Ind. 99, 105, 106, 64 N. E. 600.

Judgment affirmed.

NOTE.—Reported in 115 N. E. 678. Death: measure of damages recoverable by parent for death of minor child by wrongful act, Ann. Cas. 1912C 58, 1916B 532, 13 Cyc 369; persons entitled to sue for death of minor, 13 Cyc 332.

KERR ET AL. v. STATE OF INDIANA, EX REL.
McDANIEL.

[No. 9,320. Filed June 22, 1917.]

1. MUNICIPAL CORPORATIONS.—*Public Improvements.—Contracts.—Validity.—Interest of Public Officer.—Statute.*—In an action by a materialman against a public improvement contractor and the surety on his bond to recover for materials furnished for use in paving a city street, an answer alleging that, at the time the improvement was being made and the materials sued for were furnished, plaintiff was a member of the municipal common council, and that when the pavement was completed the council, including plaintiff, inspected the work in behalf of the city, and accepted it both as to workmanship and materials, does not aver facts sufficient to show that the sale of materials upon which the action is predicated was in violation of §8648 Burns 1914, Acts 1907 p. 538, providing that no member of the common council of a city shall be interested in any contract with the city in any matter by which any indebtedness is created or approved, and that such contract shall be absolutely void. p. 105.
2. MUNICIPAL CORPORATIONS.—*Public Improvements.—Contracts.—Validity.—Interest of Public Officer.—Public Policy.*—That a member of a municipal common council sold materials to a contractor to be used in a public improvement, and that the common council inspected the work when completed in behalf of the city and accepted the same, is not sufficient to render the contract for the sale of materials unenforceable as being in contravention of public policy, in the absence of a showing that the councilman had any interest in the improvement contract either at the time of its execution or thereafter, or that the city or public was in any way defrauded by reason of the use of the materials so furnished. p. 105.

Kerr v. State, ex rel.—65 Ind. App. 102.

3. **APPEAL. — Briefs. — Sufficiency. — Waiver of Error.**—An assigned error not mentioned under the points and authorities in appellant's briefs is waived. p. 108.
4. **APPEAL. — Questions Reviewable. — Briefs. — Sufficiency.**—A mere general statement in appellant's briefs that, where a finding is improperly affected by errors of law at the trial, or where a part of the evidence tending to support the finding upon a material point is legally insufficient, the finding is contrary to law, is, under Rule 22 of the Supreme Court, insufficient to present a question for review. p. 108.
5. **NEW TRIAL. — Grounds. — Action on Contract. — Excessive Damages.**—That the damages assessed are excessive is not a ground for a new trial in an action on contract. p. 108.

From Monroe Circuit Court; *Robert W. Miers*, Judge.

Action by the State of Indiana, on the relation of Lucien C. McDaniel, against Samuel M. Kerr and another. From a judgment for relator, the defendants appeal. *Affirmed.*

Ira C. Batman, Robert G. Miller, James W. Blair and Rufus H. East, for appellants.

Joseph E. Henley and George Henley, for appellee.

HOTTEL, C. J.—This is an appeal from a judgment in appellee's favor for \$200.07 and costs, in an action brought by it against appellants on a contractor's bond. The averments of the complaint necessary to an understanding of the question presented by the appeal are in substance as follows: On December 2, 1909, appellant Finn entered into a contract with the city of Bloomington, Indiana, whereby he agreed to build a portion of a public street in said city, according to plans and specifications adopted by its common council, to perform all the work and furnish all the materials therefor, and to pay all sums due to any contractor or person furnishing any material. A copy of said contract was filed as an exhibit with the complaint. Said Finn executed a bond in the penal sum of \$1,300, with appellant Kerr as surety, a copy of which is filed with the complaint,

and by the terms thereof appellants separately and severally obligated themselves to pay all claims for labor and material used in the construction of said street. From January 5 to July 15, 1910, relator sold and delivered to said Finn, at his special instance and request, a large amount of cement, coal and sand, aggregating \$372, a bill of particulars of which is filed with the complaint, which material was used in the construction of the street. Relator has made demand upon said Finn, and he failed and refused to pay, thereby violating the terms of the contract and bond.

To this complaint appellants each separately filed the same answer in three paragraphs, viz., a general denial, a plea of payment, and a third paragraph, which alleges in substance that the city of Bloomington, at the times mentioned in the complaint, was a city of the fifth class; that relator was duly elected a member of its common council on November 2, 1909, and duly qualified as such on January 1, 1910; that he continued to be a member of such council until January 1, 1914; that said Finn entered upon the performance of said contract subsequently to January 1, 1910, and constructed and completed the whole of said improvement during the year 1910, during which period the relator continued to act as a member of the common council of the city and furnished to said Finn the material described in the complaint, which was used in the construction of the street; that said Finn completed the improvement, and the council, including the relator, inspected the work and accepted the improvement, both as to workmanship and material, including the materials so furnished by the relator. That the sale of material by the relator to Finn as such contractor was against public policy and void, and that the amount thereof is not chargeable to the bond in suit.

Demurrers to said third paragraphs of answer were

sustained and exception saved by each appellant. There was a trial by the court and a special finding of facts and conclusions of law in appellee's favor. The first and second errors assigned and relied on for reversal respectively challenge the ruling on said demurrers to each appellant's said third paragraph of answer. This ruling presents the controlling question of the appeal.

Appellants insist in effect that the facts averred in said answer show that the sale of the materials upon which relator's cause of action is predicated was

1. in violation of §8648 Burns 1914, Acts 1907 p. 538, and hence that such answer stated a good defense to the cause of action.

In the recent case of *Finn v. State, ex rel.* (1916), 66 Ind. App. —, 114 N. E. 9, this court, in determining the sufficiency of a similar answer, held that its averments did not bring it within the provisions of said statute.

Appellants, however, insist in effect that independently of statute the facts pleaded in said answer show that the sale of said material by the relator was

2. one, the natural tendency of which placed appellee in a position of antagonism to the public duty required of him as a member of the city council, and had a tendency to make him less diligent in the discharge of his official duty; and hence that such sale was against public policy and void. In the case just referred to, this court indicated that the question now suggested was not presented in that case, and for that reason expressly reserved its opinion thereon. Appellants have cited a number of cases in which officers have been directly interested in public contracts, but, with the exception of the case just cited, we have been unable to find any case in this state where it was charged that an officer was interested in a public contract, other than cases in which the contract involved was one be-

tween the official and the municipality or public corporation of which he was an official.

In determining the question under consideration, it must be kept in mind that the principle of law which forbids the enforcement of any contract on the ground that it contravenes public policy, whether found in express legislative enactment or in the body of the law, as expressed and declared by the courts and the legal textwriters, rests always upon the idea that the contract so forbidden is injurious to the public or the state. In the answer under consideration, there is no averment that relator contracted with the city, and nothing appears therein which shows that he had any interest, either direct or indirect, in such contract at the time of its execution, or that there was any agreement, collusion or secret understanding of any kind between relator and the contractor when the contract was made whereby relator became in any way connected therewith or interested therein. No fraud of any kind is shown or attempted to be shown whereby the city or the public was in any way affected to its harm or injury by reason of said contract or on account of the material used in the improvement involved therein. True, the answer shows that appellant Finn procured the acceptance by the city of said improvement, including the material furnished by the relator, and that when such acceptance was procured the relator was a member of the council that accepted it; but to our minds this averment weakens rather than strengthens appellants' position, because it shows that the contractor has received the full benefit of the contract which he is now seeking to avoid on the ground that it contravenes public policy, and that, in so far as there was a possibility of the public being injuriously affected by the acceptance of the improvement and said material furnished by the relator in connection therewith, appellant Finn

has himself procured the full benefits of such acceptance and received value from the city for the materials.

Even in cases where the *public corporation* seeks to avoid the payment of an honest obligation for material received and used by it, the courts, in the absence of a positive statute requiring them to do so, hesitate to lend their aid in accomplishing such an end on the ground of a mere surmise that sales by one of the officers of such corporation of material to the contractor may have influenced the mind of such official in the acceptance of such contract originally, or in the acceptance of the work done or material furnished thereunder. *Escondido Lumber, etc., Co. v. Baldwin* (1906), 2 Cal. App. 606, 84 Pac. 284; *O'Neill v. Auburn* (1913), 76 Wash. 207, 135 Pac. 1000, 50 L. R. A. (N. S.) 1140.

If, in such cases, the courts hesitate to relieve the public corporation from liability, much greater reason exists for a court's refusal to give consideration or aid to the accomplishment of such an end when, as in the instant case, the invalidity of the contract is invoked by the contractor himself, to avoid paying for the very material, the acceptance of which, and the payment for which, he has procured at the hands of such public corporation. *Worrell v. Jurden* (1913), 36 Nev. 85, 132 Pac. 1158. Elliott, in his work on Contracts (Vol. 2, p. 10, §650), says: "A doubtful matter of public policy is not sufficient to invalidate a contract. An agreement is not void on this ground unless its contravention of public policy is clear and is manifestly injurious to the interest of the state." The authorities cited, *supra*, we think, necessitate the conclusion that the demurrer to said answer was properly sustained.

Appellants' third and fourth assigned errors, respectively, challenge the trial court's conclusions of law and its ruling on their motion for new trial. The third is

3. not mentioned in their points and authorities and is therefore waived.

The motion for new trial is not set out in their brief, but, under their points and authorities, appellants indicate certain grounds of such motion upon which,

4. we assume, they rely for reversal. These grounds alone will be considered. Appellants state generally, in their brief, that where a finding is improperly affected by errors of law at the trial, or where a part of the evidence which tends to support the finding upon a material point is legally insufficient, the finding is contrary to law. They do not show how the finding was improperly affected, or by what errors it was affected, or what fact essential to the decision was not sustained by the evidence. Such general proposition or statement is, under Rule 22, insufficient to present any question. *Leach v. State* (1911), 177 Ind. 234, 240, 97 N. E. 792; *German Fire Ins. Co. v. Zonker* (1914), 57 Ind. App. 696, 108 N. E. 160; *Mutual Life Ins. Co. v. Finkelstein* (1914), 58 Ind. App. 27, 31, 107 N. E. 557; *Town of New Point v. Cleveland, etc., R. Co.* (1915), 59 Ind. App. 147, 158, 107 N. E. 560; *Inland Steel Co. v. Smith* (1906), 168 Ind. 245, 252, 80 N. E. 538. In this connection it should be stated that, under the heading "Error of the court in excluding testimony," appellants complain of the court's refusal to hear certain evidence which would have been pertinent and applicable to said third paragraph of answer. Our disposition of the ruling on the demurrer to said answer, in effect, disposes of this contention.

Appellants say also that "*the damages assessed are excessive.*" This was one of the grounds of their motion for new trial, but no question is presented by

5. such ground in an action on contract. *Brown v. Guyer* (1916), 64 Ind. App. 356, 115 N. E. 947, 948, and cases there cited.

We might add, however, that, assuming that such question is presented in said motion by a ground thereof in the form and words prescribed by the statute (§585, cl. 5, Burns 1914, §559 R. S. 1881), our examination of the evidence convinces us that no available error would be presented thereby.

Finding no reversible error in the record, the judgment below is affirmed.

NOTE.—Reported in 116 N. E. 590. States—public improvements: obligation of public corporation to pay for services rendered under a contract in which an officer is personally interested, 34 L. R. A. (N. S.) 129; effect of indirect interest of public officer in performance of contract for construction of public improvement, 50 L. R. A. (N. S.) 1140.

AMERICAN LIABILITY COMPANY v. BOWMAN.

[No. 9,139. Filed January 30, 1917. Rehearing denied June 22, 1917.]

1. **INSURANCE.—Accident Insurance.—Construction of Policy.**—Insurance contracts providing indemnity for disability or death of the insured which are prepared by the company and are ambiguous, or reasonably subject to conflicting interpretations, are strictly construed against the company and are given such reasonable and liberal construction as will effectuate the purpose of the parties and sustain the object of entering into the contract, where it can be done without doing violence to the language employed. p. 118.
2. **INSURANCE.—Accident Insurance.—Construction of Policy.**—In construing insurance contracts, the courts give a fair and reasonable construction to the language employed, and in so doing consider the relation and situation of the parties when the contract was made, and from such considerations ascertain the meaning upon which the minds of the contracting parties may reasonably be said to have met. p. 118.
3. **INSURANCE.—Accident Insurance.—Construction of Policy.—Attempt of Insured to Work.—Total Disability Benefits.**—Under an accident insurance policy providing for the payment of indemnity for total disability resulting from accidental causes during the period that the insured was totally and continuously from the date of the accident disabled and prevented from per-

forming every duty pertaining to any business or occupation, as a necessary result of the injuries received, an injured workman may recover for total disability for the entire period he was, in fact, totally disabled, though during part of such period, a few days after his injury, he returned to work for a short time when his condition was such that he could perform only part of his duties and might reasonably have been warranted in not attempting to do any work, since a construction of the policy which would defeat a recovery because the insured made a good-faith effort to perform the duties of his usual employment would tend to encourage fraud against the company, and to discourage fairness and efforts to return to work as soon as possible after an injury. pp. 119, 121.

4. INSURANCE.—*Accident Insurance.—Construction of Policy.—Total Disability.—Question of Fact.*—The phrase “total disability,” as used in accident insurance policies, should be given a rational and practical construction, and is a relative term, depending in a measure upon the nature of the employment, the capabilities of the injured person, and the circumstances of each case, and is usually a question of fact to be determined by the court or jury. p. 120.
5. INSURANCE.—*Accident Insurance.—Construction of Policy.—Total Disability.—Attempt to Work.*—Where a party is shown to be in fact totally disabled for the entire period for which compensation is sought under an accident insurance policy, it cannot be said as a matter of law that he was not so disabled because during a portion of such time he made a good-faith, though ineffectual effort, to perform the duties of his usual employment. p. 120.
6. INSURANCE.—*Accident Insurance.—Construction of Policy.—Total Disability.—Refusal to Work.*—One insured under an accident insurance policy cannot recover for total disability where he failed or refused to work when he had an opportunity to do so, if he was at the time reasonably able to perform such work. p. 120.
7. INSURANCE.—*Accident Insurance.—Construction of Policy.—Total Disability.*—Provisions of an accident insurance policy for total disability indemnity should be liberally and fairly construed so as to give the insured the indemnity which he contracted to obtain, and at the same time to guard the company against fraud or imposition. p. 121.
8. INSURANCE.—*Accident Insurance.—Construction of Policy.—Exceptions.*—An accident insurance policy providing for indemnity in case of total disability resulting from accident, but in a subsequent clause limiting the insurer’s liability to four weeks’ indemnity “in the event of disability due to accident or

- illness, wholly or in part caused by or resulting directly or indirectly in or complicated with" neuritis, does not limit the company's liability for total disability indemnity, though during the same period neuritis developed from the injury, where it appears that insured was continuously and totally disabled by the original injury independent of any other cause. p. 122.
9. *APPEAL—Review.—Harmless Error.—Immaterial Conclusions of Law.*—In an action to recover total disability indemnity under an accident insurance policy, a conclusion of law that insured's right to recover for disability suffered subsequently to the commencement of the action was not an issue, while not essential to the judgment for plaintiff, would not of itself be cause for reversal. p. 125.
10. *APPEAL—Review.—Harmless Error.—Findings of Fact.—Immaterial Errors.*—In an action on an accident insurance policy to recover total disability benefits, findings of fact that insured was removed to his home in a vehicle after the accident, when the evidence showed that he walked, and incorrectly fixing the date when the insured became afflicted with neuritis, are not harmful to the insurer, where the inaccuracies could in no way affect the ultimate fact of total disability found by the court. p. 125.
11. *TRIAL.—Findings of Facts.—Ultimate and Evidentiary Facts.*—Ultimate issuable facts are proper in special findings and they must control the conclusions of law drawn from the facts, since evidentiary facts, though specially found, are improper and unauthorized. p. 126.

From Madison Circuit Court; *Charles K. Bagot*, Judge.

Action by Linies E. Bowman against the American Liability Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Kittenger & Diven, for appellant.

Albert H. Vestal, for appellee.

FELT, C. J.—On July 12, 1913, appellee began this suit against appellant on a health and accident insurance policy. The issues were formed by a complaint in one paragraph answered by a general denial. A trial by the court resulted in a judgment for appellee in the sum of \$240, from which this appeal was taken. Appellant has assigned as error the overruling of its

motion for a new trial and separate error on each of the five conclusions of law stated upon the special finding of facts duly made by the court.

The complaint, in substance, charges that on September 7, 1910, appellee applied for and obtained a policy in appellant company, whereby it promised, in the event of bodily injury resulting through external, violent and accidental means, to pay appellee forty dollars per month, so long as he should be prevented from performing his ordinary business by reason of such injuries; that he complied with all the provisions of the policy so issued to him, and on November 17, 1912, while the policy was in force, he received a personal injury which was caused by the slipping of a ladder on which he was working, whereby he was thrown ten feet to and upon a cement floor, causing an injury to his back, side and spine; that by reason of such injuries he was prevented from following his occupation or attending to any work or business continuously from December 27, 1912, and still is totally disabled and prevented from performing any duty pertaining to any business or occupation; that due proof of his disability for the period of six months was furnished appellant and payment was refused. The policy is made a part of the complaint as "Exhibit A" and it is averred that there is due thereon the sum of \$280 for which judgment is demanded.

The finding of facts follows the averments of the complaint and, omitting uncontroverted statements, is in substance as follows: On September 7, 1910, appellee was an able-bodied man in good health, and in sound physical condition and on that day appellant issued to him a health and accident policy, the substance of which, as far as material here, is as follows:

The policy to be in force until 12 o'clock noon of October 1, 1910, "and for such further periods as the premium paid will maintain this policy in force. * * *

"Total Accident Disability.

"A. At the rate of forty dollars per month, for the period, not exceeding twenty-four consecutive months, that the assured, is totally and continuously from the date of accident disabled and prevented from performing every duty pertaining to any business or occupation, as a necessary result, independent of all other causes, of bodily injuries effected through external, violent and accidental means. * * *

"Illness Indemnity.

"E. At the rate of forty dollars per month for the number of consecutive days (deducting the first week unless continuing twenty-eight consecutive days) that the assured is strictly and continuously confined within the house and therein regularly visited and treated by a legally qualified physician and necessarily totally disabled, by reason of illness having its cause and beginning after this policy has been maintained in continuous force for thirty days; and if, during convalescence following said house confinement, the assured shall be necessarily and continuously disabled from performing every duty pertaining to any business or occupation, and require and receive the regular attendance of such physician, the company will pay him indemnity at one-half of said rate for the period of such convalescence not exceeding four weeks. * * *

"Miscellaneous Provisions. * * *

"2. In the event of disability, due to either accident or illness, wholly or in part caused by or resulting directly or indirectly in or complicated with tuberculosis, rheumatism, paralysis, apoplexy, orchitis, neuritis, locomotor ataxia, lumbago, lame back, strains, sciatica, vaccination, Bright's disease, cancer, dementia, hernia, insanity, or in the event of any accidental injury otherwise covered by this policy resulting in hernia, terminating fatally or otherwise, then in all such cases referred to in this paragraph, the only liability of the company shall be indemnity for a period of disability

not exceeding four weeks in any one policy year, anything herein to the contrary notwithstanding.
* * *

"6. The company may cancel this policy at any time, without prejudice to the rights of the assured as to any claim then pending, by written notice of cancellation served upon the assured or mailed to the assured at the address herein given, together with the company's check for the unearned portion, if any, of the premium paid.

"7. Indemnity will not accrue hereunder in excess of the time the assured is, by reason of injury or illness, under the professional care and regular attendance of a legally qualified physician or surgeon. If the assured is disabled by injury or illness for more than thirty days, he or his relatives shall as a condition precedent to recovery hereunder, furnish the company every thirty days with a report in writing from his attending physician or surgeon, fully stating the condition of the assured and the probable duration of the disability.
* * *

"9. This policy with the schedule of warranties endorsed hereon, contains the entire contract between the parties hereto, and no agent has authority to change it or waive any of the provisions.

"2. That on the reverse side of said policy, in written and printed matter, under the head and title of 'Schedule of warranties,' was endorsed the following language:

"Schedule of Warranties.

"By accepting this policy the assured agrees that each statement in this schedule is material, and warrants each to be true. * * *

"I agree to pay a monthly premium of One and 20/100 Dollars in advance without notice or demand."

The court also found that from the issuance of said policy appellee promptly paid all dues and premiums on same up to and including June 7, 1913; that on November 17, 1912, while working at his usual employment,

the ladder on which appellee was standing slipped and threw him to the floor and injured his right side and hip and his back in the region of the crest of the ilium, which injury was accompanied by an external visible bruise and discoloration; that he was thereby totally disabled, immediately after receiving such injury and continuously for about four days; that immediately after receiving the injury appellee was removed to his home and on that day was visited and treated for said injuries in his home by a physician, and at the end of said four days he was still suffering from his injuries and returned to his work; that continuously thereafter, except on Sunday, until December 27, 1912, he went to his work "and attempted to perform his duties under his employment and did perform a great part of said duties; but that his performance of said duties was with great pain and suffering, and there was a considerable portion of said duties he was unable to perform and required the assistance of another man in performing the services, which he, had it not been for said injury, would have been able to perform himself, and did perform himself prior to the receiving of such injury." That on December 27, 1912, the suffering from said injuries became so severe that he was unable to perform any labor, and from that date continuously to the present time—the case was tried in June, 1914—has been wholly and totally disabled from performing manual labor, or pursuing his avocation, or performing any of the duties of his employment, and has been continuously under the care and treatment of a regularly licensed physician; that said injury was entirely received from external, violent and accidental causes, and appellee's disability aforesaid was directly and immediately caused by such injury; that on January 16, 1913, said injury produced neuritis from which

appellee has continuously suffered, and by reason of which he has been entirely and totally disabled from performing manual labor as aforesaid, and rendered wholly unable to perform any part of his usual work or to earn any money by his labor; that said neuritis is not an independent disease, but is coupled with and the result of said injury and was wholly caused thereby. The court also finds that on January 7, 1913, appellee notified appellant in writing of said injury, which notice was received by appellant; that later, at request of appellant, appellee sent to the company the statement of his attending physician and filled out the preliminary notice furnished him by appellant, all of which were received by appellant; that on February 21, 1913, appellant called for a second preliminary report, which was furnished it on March 1, 1913, and on March 3, and again on March 8, 1913, appellee sent to appellant another proof of injury made out by his physician, and at appellant's request sent other proofs of injury, and later on had further communications with appellant and sent additional preliminary reports made out by his physician, the details of which are found and set out by the trial court; that on April 1, 1913, appellant called for "Final proof of Illness," and on May 31, 1913, after further correspondence appellee made out proof of his injury and sent same to appellant, together with the statement of his physician on blanks provided by appellant; that on July 12, 1913, appellant notified appellee that after careful examination of his claim from the statements of himself and his physician the company had concluded his disability was due to neuritis, and the company's liability therefor was limited to four weeks in any one policy year, and that in payment thereof it enclosed draft payable to him for \$30.66; that on July 29, 1913, appellee by his attorneys returned the draft

for \$30.66 and also a check for \$3.60 sent by appellant as a return of unearned premiums paid by appellee, and also notified appellant that its alleged reasons for refusing to pay full indemnity were unfounded and that suit had been commenced to recover the amount due appellee. The court also found that all the aforesaid disabilities of appellee are the necessary result, independent of all other causes, of the bodily injury aforesaid so received by appellee; that appellee had substantially complied with all the terms and conditions of the policy to be performed by him, and that appellant by its acts, conduct and dealings with appellee has waived all irregularities and technical omissions on his part required by the provisions of the policy issued to him.

On the foregoing finding of facts the court stated its conclusions of law as follows: "(1) The law is with appellee and he is entitled to recover \$240. (2) That the notice of injury stated in the findings was accepted by appellant as notice under the terms of the policy and was furnished within reasonable time after receiving the injury within the meaning of the law applicable thereto. (3) That the provisions of sub-division two, under the heading 'Miscellaneous Provisions,' in said policy, does not preclude the plaintiff's right to recover on said policy, nor limit his right to recover to a period of four (4) weeks in any one policy year. (4) That the plaintiff is entitled to recover his costs in this action. (5) That the plaintiff's right to recover on account of the injury in suit, for disability suffered after the time of the commencement of this action, is in no way an issue in this cause, and is not in any way litigated, determined or adjudicated, nor the rights of either party affected or prejudiced.

"This, the 11th day of June, 1914.

"Chas. K. Bagot,

"Judge of the Madison Circuit Court."

Under points and authorities appellant contends that the findings show that appellee was not "totally and continuously from the date of accident disabled and prevented from performing every duty pertaining to any business or occupation" within the meaning of the provisions of his policy, and that the court erred in its conclusions of law, allowing him full indemnity for six months; that under paragraph No. 2 of "Miscellaneous Provisions" of the policy appellee was only liable for four weeks' indemnity, which was duly tendered him, and that the court therefore erred in its first and third conclusions of law; that the fifth conclusion of law is outside the issues. No point is made or urged against the second or fourth conclusions of law.

We limit our discussion to the points presented, and by them appellant concedes liability for four weeks' sickness and claims the benefit of its tender, but asserts that appellee is not entitled to recover for total disability for any period of time under the provisions of the policy and the facts found by the court.

Insurance contracts providing indemnity for disability or death of the insured, which are prepared by the company, and are ambiguous or reasonably sub-

1. ject to conflicting interpretations, are strictly construed against the company and are given such reasonable and liberal construction as will effectuate the purpose of the parties and sustain rather than defeat the object of entering into the contract, where it can be done without doing violence to the language employed. In construing such contracts courts
2. give to the language employed a fair and reasonable construction, and in so doing consider also the relation and situation of the parties when the contract was entered into, and from such considerations seek to ascertain the meaning or propositions upon which the minds of the contracting parties may reason-

ably be said to have met at that time. *Hay v. Meridian Life, etc., Co.* (1914), 57 Ind. App. 536, 545, 101 N. E. 651, 105 N. E. 919; *Indiana Life, etc., Co. v. Reed* (1913), 54 Ind. App. 450, 465, 103 N. E. 77, and cases cited; *Workingmen's Mutual, etc., Assn. v. Roos* (1916), 63 Ind. App. 18, 113 N. E. 760, and cases cited.

The facts found are amply sufficient to show total disability of appellee for the requisite period of time, and the chief difficulty arises from a considera-

3. tion of those facts which show that four days after his injury, while still suffering from the effects thereof, he returned to his work and for more than a month performed a large part of the duties of his employment, though during all such time he continued to suffer intensely and was greatly incapacitated, and then finally, from the effects of his original injury, which had become more severe and malignant, he became wholly unable to perform any labor of any kind and was confined to his home for treatment; and likewise the finding which shows that the injury caused neuritis.

If the performance of such labor under the conditions shown destroys or so modifies the findings, which show total and continuous disability due solely to appellee's injury for the requisite period of time, that under his policy we are compelled to hold that he does not come within the provisions which allow compensation for total disability, then the first and third conclusions of law are erroneous. The findings disclose a situation where the injury was more severe and the results more permanent and harmful than they at first appeared to be, and in which the injured party showed unusual desire, and put forth an extraordinary effort, to labor while still incapacitated by his injuries. He was in no sense a malingerer, and the facts present the question whether, by his premature effort to labor while so

incapacitated, he is, under the provisions of his policy, deprived of compensation which he would clearly be entitled to receive had he remained away from his employment and made no effort to labor, as the severity of his injury and the intensity of his suffering clearly warranted him in doing.

The rule prevails in this and most jurisdictions that provisions in a policy for total disability, irrespective of the technical variations in the language em-

4. ployed, should be given a rational and practical construction; that the phrase "total disability" is a relative term, depending in a measure upon the nature of the employment, the capabilities of the injured person, and likewise the circumstances and peculiar facts of each particular case. It is usually a question of fact to be determined by the court or jury trying the case and was such question in the case at bar. *Indiana Life, etc., Co. v. Reed, supra; Workingmen's Mutual, etc., Assn. v. Roos, supra; 4 Cooley, Briefs on Ins. 3288-3290; Kerr, Ins. 385.*

Where a party is shown to be in fact totally disabled, for the entire period for which compensation is sought, it cannot be held as a matter of law that he was

5. not so disabled because during a portion of such time he made a good-faith, though ineffectual, effort to perform the duties of his usual employ-
6. ment. Nor could he be held to be totally disabled because he failed or refused to labor, when he had the opportunity so to do, if in fact he was at the time reasonably able to perform such labor. *Pacific Mut. Life Ins. Co. v. Branham* (1904), 34 Ind. App. 243, 246, 70 N. E. 174; *Commercial Travelers', etc., Assn.* (1899), 23 Ind. App. 657, 662, 55 N. E. 973; *Indiana Life, etc., Co. v. Reed, supra; Young v. Travelers Ins. Co.* (1888), 80 Me. 244, 247, 13 Atl. 896; *Hohn v. Inter-State Casualty Co.* (1897), 115 Mich. 79, 72 N. W.

1105; *Turner v. Fidelity, etc., Co.* (1897), 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. 428; *Lobdill v. Laboring Men's, etc., Assn.* (1897), 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. 542.

In several of the cases above cited it is stated in substance that provisions for total disability similar to those in the policy now under consideration, in

7. all cases of doubt, should be liberally and fairly construed so as to give to the insured the indemnity which he contracted to obtain, and at the same time the language employed should be so construed as to serve the purpose of guarding the company against fraud or imposition. In the case at bar the finding of the court shows that the conclusion reached was consistent, both with the idea of providing the indemnity contemplated by the parties when the contract

3. was entered into, and of effectually safeguarding the company against fraud or imposition of any kind. Such construction gives effect to the whole contract and effectuates the purpose upon which the minds of the contracting parties met when the policy was issued by the company and accepted and paid for by the insured. To allow appellee only four weeks' sick benefits, in the face of the finding which clearly shows total disability for over six months, and an actual cessation of labor for most of that time, and for all the time, but for the extraordinary conduct of appellee in a good-faith effort to work while disabled and still suffering from the continuing effects of his injury, would require a narrow and technical construction of the policy in favor of appellant, notwithstanding the facts found show that it was in no sense imposed upon by fraud or unfair dealings and has only been called upon to pay the amount it obligated itself to pay under such conditions as are shown by the findings. Such narrow construction would tend to place a premium on fraud

and deception, to discourage fairness and effort to return to employment as soon as possible after an injury, and in the end would result in greater hardships to insurance companies than the broader and more liberal construction which affords sufficient latitude to enable courts in applying the law to particular cases to discriminate between malingerers and those who in fairness and honesty have reasonably and substantially complied with the provisions of insurance contracts like the one under consideration. But it is also contended in this case that the finding which shows that the injury produced neuritis from which appellee continuously suffered and by reason of which he was totally dis-

8. abled, brings the case squarely within the provisions of clause two of "Miscellaneous Provisions" of the policy and limits the period for which compensation may be allowed to four weeks. Considering only such finding and said clause two, the contention seems to have merit. But we must consider all the provisions of the policy and all the facts found by the court which bear upon the question of the compensation due appellee.

On the face of the policy it is stated that the "American Liability Company insures the person named as assured * * * from the first of October, 1910, and for such further periods as the premium paid will maintain this policy in force, against the contingencies as hereinafter provided.

"Total Accident Disability.

"A. At the rate of forty dollars per month, for the period, not exceeding twenty-four consecutive months, that the assured is totally and continuously from date of accident disabled and prevented from performing every duty pertaining to any business or occupation, as a necessary result independent of all other causes, of bodily injuries effected through external, violent and accidental means."

The foregoing provisions of the policy are followed by numerous detailed specifications relating to "Partial Accident Disability," "Specific Total Losses," "Double Indemnity," "Illness Indemnity," "Extended Illness Indemnity," and some ten or more other general headings or topics which are followed by detailed specifications and statements in fine print and these are followed by the general heading, "*Miscellaneous Provisions*" which consist of nine paragraphs, and on the reverse side of the policy appears "Schedule of Warranties," a copy of the application, various stipulations and limitations and an agreement to pay the premiums as specified in the policy. The provision relied upon by appellant to limit recovery to four weeks is found in clause No. 2 of "*Miscellaneous Provisions*," which is as above set forth. The finding not only shows the development of neuritis but that appellee was totally and continuously disabled up to the time of the trial in June, 1914. After concluding the findings which set forth the injury, the development of neuritis, and the disability of appellee, the court states the ultimate fact "that all the aforesaid disabilities of appellee are the necessary result, independent of all other causes, of the bodily injury aforesaid so received by appellee." This is a clear statement that, notwithstanding neuritis developed from the injury, appellee was continuously and totally disabled by the original injury independently of neuritis or any other cause other than such injury; in other words, the period of total disability for which appellee was allowed compensation was independent of, and not changed or prolonged by, neuritis. To hold that the development of neuritis would shorten the period of compensation to four weeks under such a state of facts would be to bring the provisions of said clause No. 2 into conflict with and make them contradictory to the general provisions on the face of the policy which prom-

ise compensation for total disability for a period of time not exceeding twenty-four months. The provisions of said clause No. 2 may apply to cases in which neuritis or other diseases named develop and in which it is not shown that the period of disability for which compensation is allowed was entirely independent of and not prolonged by such disease. Such construction gives effect to the general provisions for total disability, and also to those limiting the period of compensation to four weeks, under certain specified conditions, is reasonable, and is consistent with the object sought to be attained by the issuance and acceptance of the policy. But if we should take the view that the provisions of said clause No. 2 necessarily mean that compensation is to be limited to four weeks in every case where one of the specified diseases develops, regardless of the character and extent of the original injury and the period of time during which total disability resulted therefrom independently of all other causes, still on the facts of this case we should reach the same result. Appellee sought indemnity and appellant agreed to furnish it according to the provisions of the contract. The first and prominent provision of the policy is clear in its promise of forty dollars per month for total disability. The construction of said clause No. 2 last above indicated would be inconsistent with and contradictory to the provision for total disability and would render the policy ambiguous.

We should then apply the rules of construction above stated and be compelled to hold that the minds of the contracting parties never met upon such proposition and that appellant promised to indemnify appellee to the extent of \$40 per month for continuous total disability, and that, in as much as the finding of facts shows such disability independent of the neuritis that developed, such disease is only incidental to the case

and does not materially affect or change the ultimate fact of total disability due as the court found, solely and exclusively to the original injury. We therefore conclude that the court did not err in either the first or third conclusion of law.

The fifth conclusion of law, to the effect that appellee's right to recover for disability suffered after the commencement of this suit is not in issue or de-

9. terminated by this suit, was not essential to the judgment in this case; but it only states what is apparent from the pleadings and the findings of the court, and in any view that may be taken of it, would not afford a cause of reversal if the judgment is otherwise correct.

Under the motion for a new trial appellant contends that the court's findings Nos. 6, 7, 10 and 40 are not sustained by sufficient evidence. In finding No.

10. 6 the court stated that immediately after his injury appellee was removed to his home in a vehicle, and on the same day a physician was called to the home who treated him for his injury. We find no evidence that he was taken home in a vehicle, but the undisputed evidence shows that he walked home by the help of Mr. Garrison and that a physician was called who treated him as stated in the finding. The inaccuracy is an unimportant minor detail which in no way affects the ultimate facts found by the court or the conclusions of law drawn therefrom. The tenth finding states in substance that on January 16, 1913, the injury produced neuritis, the center of which was immediately in the locality of the injury, and that appellee suffered therefrom continuously thereafter to the time of the trial and was thereby totally disabled. The fortieth finding states that all of the disabilities heretofore found, from which the plaintiff suffered, "are the necessary result, independent of all other causes, of the

bodily injury so affected through the external and accidental means heretofore found and stated." Appellant only points out an inaccuracy in the tenth finding in the date, by the substitution of January 16, 1913, for December 27, 1912. The criticism is probably correct but is only another unimportant minor detail as the particular date could not change the important ultimate facts relating to the injury and the results that followed. Both the tenth and fortieth findings state ultimate facts that are important and within the issues. There is evidence from which the ultimate facts so stated could be reasonably inferred and the trial court was entirely within its province in so stating them.

Ultimate issuable facts are proper in special find-

11. ings and are the facts which must control the conclusions of law drawn from the facts, since mere evidentiary facts, though often found in special findings, are improper and unauthorized. The seventh finding deals with appellee's return to his employment, his incapacity and suffering, and the assistance he had in the performance of his duties when he returned to his work four days after his injury.

The evidence shows that appellee was a fireman and that the engineer helped him perform his duties when he was feeling badly, and that prior to his injury he readily performed all the labor required in his position without any assistance. The trial court had the right to draw from the evidence any reasonable inference, and while the evidence on the points of the amount of the assistance needed and received by appellee at such time is somewhat meager, we cannot say there is a total failure of evidence from which the court might infer the facts stated in such finding. The court found and stated the ultimate facts which warrant recovery for six months' total disability, and there is evidence tend-

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ing to prove all of such facts. The findings support the conclusions of law on which the judgment rests.

We find no reversible error. The case seems to have been fairly tried on its merits and a correct result reached. §700 Burns 1914, §658 R. S. 1881.

Judgment affirmed.

Ibach, P. J., Dausman, Caldwell, Batman and Hottel, JJ., concur.

NOTE.—Reported in 114 N. E. 992. Insurance: construction of "total disability" clause in accident policy, 7 Ann. Cas. 815, 8 Am. Rep. 218, 1 Cyc 269, 297, 1 C. J. 462; what constitutes "disability" within meaning of accident or health policy, 38 L. R. A. 529, 23 L. R. A. (N. S.) 352, 29 L. R. A. (N. S.) 635, L. R. A. 1917B 108; construction of accident policy, 1 Cyc 243, 1 C. J. 414.

C. AND W. KRAMER COMPANY v. MILLER.

[No. 9,556. Filed March 29, 1917. Appellant's petition to reinstate appeal denied June 22, 1917.]

MASTER AND SERVANT.—*Workmen's Compensation Act.*—*Appeals.*

—*Time for Perfecting.*—Under §61 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that an appeal may be taken to the Appellate Court within thirty days from the date of an award by the Industrial Board, where, in an appeal from an award, the transcript and assignment of errors was not filed until after the expiration of the thirty-day period, they were too late, and the appeal must be dismissed.

From the Industrial Board of Indiana.

Proceeding for compensation under the Workmen's Compensation Act by Rice Miller against C. and W. Kramer Company. From an award for applicant, the defendant appeals. *Appeal dismissed.*

Silverburg, Bracken & Gray, for appellant.

Freeman & Freeman, for appellee.

BATMAN, J.—This is an appeal from an award, made by the Industrial Board of Indiana in favor of appellee against appellant. The record discloses that the award

in this case was made by the full board on February 1, 1916, and the transcript and assignment of errors were filed in this court on March 25, 1916, more than fifty days after such award.

The section of the statute under which this appeal is evidently attempted expressly provides that either party to the dispute may appeal within thirty days from the date of such award. §61, Acts 1915 p. 392. The right of appeal is statutory, and a party desiring to avail himself of such privilege must comply with the statute in that regard. The section cited above is the only authority for an appeal from the Industrial Board.

It has been held that an appeal is taken in a cause from the time the transcript and assignment of errors are filed with the clerk of the court to which the appeal is taken. *Lake Erie, etc., R. Co. v. Watkins* (1901), 157 Ind. 600, 62 N. E. 443; *Ragle v. Dedman* (1909), 45 Ind. App. 693, 91 N. E. 615; *Pittsburgh, etc., R. Co. v. Johnson*, (1911), 49 Ind. App. 126, 93 N. E. 683, 95 N. E. 610. Since this essential step was not taken in this case until more than fifty days after the date of such award, it follows that the attempted appeal was not perfected in the time provided by statute, and hence this court has no jurisdiction to determine the cause on its merits. Appeal dismissed.

NOTE.—Reported in 115 N. E. 597. Workmen's compensation: time to appeal from award, L. R. A. 1916A 178.

IN RE BOWERS. IN RE WILLIAMS. IN RE COLAN.

[No. 9,949. Filed June 26, 1917.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.*—*Scope.—Right to an Award.*—Where the enterprise is being conducted and the work is being done subject to the provisions of the Workmen's Compensation Act (Acts 1915 p. 392), the right to an award of compensation is extended, under §2, to

- all cases of personal injury of an employe or his death by accident arising out of and in the course of the employment, personal injury or death due to the employe's own wilful misconduct being excepted by §8 of the act. p. 131.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Measure of Compensation.*—Sections 29 and 30 of the Workmen's Compensation Act (Acts 1915 p. 392), specify a rule of admeasurement of compensation both where the injury causes partial disability, or total disability, which includes death. p. 132.
 3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Personal Injury.*—Under §76d of the Workmen's Compensation Act (Acts 1915 p. 392), the term "personal injury," as used in the act, does not include disease in any form except as it results from the injury. p. 132.
 4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Scope.—Construction.—Rights and Remedies.*—In view of §6 of the Workmen's Compensation Act (Acts 1915 p. 392), providing that the rights and remedies created in favor of an injured employe shall exclude all other rights and remedies in his favor and against his employer at common law, it should be presumed from a consideration of the general spirit of the act that the legislature did not intend to narrow the rights of an injured employe, but rather that the rights and remedies afforded by the act should extend to all situations wherein, if there was no workmen's compensation act, an injured employe would have his remedy at common law for injuries received, and the act should be so construed where its language reasonably permits, the general purpose of the act being to substitute its provisions for pre-existing rights and remedies. p. 132.
 5. MASTER AND SERVANT.—*Injuries to Employe.—Injuries Aggravating Disease.*—Where one is injured through the negligence of another, the fact that the former is predisposed to some disease and the injury materially aggravates or incites the disease and accelerates it to the stage of disability or to a fatal termination, and the forces which contribute, each materially, to produce such disability or death, are the disease and its aggravation or acceleration by the injury, the person injured or his representative has his remedy at common law. p. 133.
 6. MASTER AND SERVANT.—*Workmen's Compensation Acts.—Injury to Employe Afflicted with Disease.—Right to Award.*—Where an employe afflicted with disease receives a personal injury under such circumstances that he might have obtained compensation under a workmen's compensation act on account of the injury had there been no disease involved, but the dis-

ease is materially aggravated or accelerated by the injury, resulting in disability or death earlier than would otherwise have occurred, and the disability or death does not result from the disease alone progressing naturally as it would have done under ordinary conditions, but the injury, aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the Workmen's Compensation Act (Acts 1915 p. 392). p. 133.

From the Industrial Board of Indiana.

Certified question of law.

Proceedings under the Workmen's Compensation Act in the matter of one Bowers, one Williams, and one Colan. Questions of law certified by the Industrial Board. *Questions answered.*

CALDWELL, J.—The Industrial Board, under the provisions of §61 of the Workmen's Compensation Act (Acts 1915 p. 392), has certified to this court for determination three questions of law based severally on the facts presented by three several proceedings pending before that body, which proceedings we have entitled as above. The statement of facts in each proceeding as submitted to us discloses that the employe involved while engaged in the discharge of the duties of his employment suffered a personal injury "by accident arising out of and in the course of his employment." In the Bowers case the employe at the time of receiving such personal injury, which was severe in its nature, was afflicted with a "progressive incurable disease" which at that time had not advanced to the stage of producing disability. The injury, however, greatly aggravated the disease with which the employe was afflicted, and incited it to a more rapid progress, and as a result of such aggravation the employe died in less than a month after receiving such personal injury. In the second case the personal injury was not regarded as serious at the time it was received. Williams, the em-

ploye, however, was at the time afflicted with progressive arterio sclerosis, sometimes popularly referred to as hardening of the arteries, but such disease had not progressed to the point of disability. The personal injury, however, greatly accelerated and aggravated the progress of the disease, and by reason of such aggravation of the disease and acceleration of its progress, the employe within about three weeks after receiving such injury became totally and probably permanently disabled for work.

In the Colan case the personal injury was caused by a severe blow upon and over the spine in the region of the dorsal and lumbar vertebrae. Colan, the employe, was at the time afflicted with Potts disease or tuberculosis of the spine, which disease was in a latent and inactive condition. The personal injury, however, incited the disease to a virulent activity and, as a result of the incitement of such disease by the injury, Colan, about five weeks thereafter, became totally and probably permanently disabled for work.

In the Bowers case we are required to determine whether the widow, who is a dependent, is entitled to an award of compensation on the ground that the injury to the deceased employe, her husband, was the cause of his death, and in each of the other cases whether the employe involved is entitled to an award of compensation on the ground that his injury is the cause of his disability.

Where the enterprise is being conducted and the work is being done subject to the provisions of the act, the right to an award of compensation extends to all

1. cases of personal injury of an employe or his death "by accident arising out of and in the course of the employment." §2, *supra*. The personal injury or death of the employe due to his own wilful misconduct, however, is excepted. §8, *supra*. The act

specifies a rule of admeasurement of compensation "where the injury causes total disability" (which includes death), §29, *supra*, and also "where the injury causes partial disability." §30,

3. *supra*. The term "personal injury," as used in the act, "shall not include a disease in any form except as it shall result from the injury." §76 (d), *supra*. It will be observed that the act does not make specific provision for a case wherein disability or death results from a personal injury not as the sole cause, but exercising a contributory effect with some existing malady or disease, in that the former arouses the latter from a latent state or aggravates it, and thus accomplishes disability or death at an earlier date than otherwise would have resulted had the disease not been incited by the injury. It is provided, however, that: "The rights and remedies herein granted to an employe subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employe, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury or death." §6, *supra*. Respecting cases wherein an employe may be compensated on account of injuries received, the act is broader and more inclusive than the common law; that is, there are many cases wherein under the act an employe may be awarded compensation on account of injuries received, when in an action at common law he would be denied relief.

In view of the provisions of §6, *supra*, to the effect that the rights and remedies created in favor of an injured employe by the act, exclude all rights and

4. remedies in his favor and against his employer at common law, it should be presumed from a consideration of the general spirit of the act and the sound economic policy upon which it is grounded that the legis-

lature did not intend by the act to narrow the rights of an injured employe; but rather that the rights and remedies afforded by the act, while not circumscribed by such limits, should extend to all situations wherein, were there no workmen's compensation act, an injured employe would have his remedy at common law for injuries received, and the act should be so construed where its language reasonably admits of such construction; the general purpose of the act being to substitute its provisions for pre-existing rights and remedies. In re *Cox's Case* (1916), 225 Mass. 220, 114 N. E. 281.

Where one is injured through the negligence of another, the fact that the former is afflicted with or predisposed to some disease, and the injury ma-

5. terially aggravates or incites the disease and accelerates it to the stage of disability or to a fatal termination, and the forces which contribute, each materially, to produce such disability or death, are the disease and its aggravation or acceleration by the injury, the victim or his representative has his remedy in cases governed by the common law. *Sherman v. Indianapolis Traction, etc., Co.* (1911), 48 Ind. App. 623, 96 N. E. 473; *Louisville, etc., R. Co. v. Falvey* (1885), 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Jeffersonville, etc., R. Co. v. Riley* (1872), 39 Ind. 568; *Terre Haute, etc., R. Co. v. Buck* (1884), 96 Ind. 346, 49 Am. Rep. 168; *Jones v. City of Caldwell* (1911), 20 Idaho 5, 116 Pac. 110, 48 L. R. A. (N. S.) 119, and note; *Railroad v. Northington* (1891), 91 Tenn. 56, 17 S. W. 880, 16 L.

R. A. 268, and note. Likewise the courts, con-

6. sistent with the theory of workmen's compensation acts, hold with practical uniformity that, where an employe afflicted with disease receives a personal injury under such circumstances as that he might have appealed to the act for relief on account of the injury had there been no disease involved, but the dis-

ease as it in fact exists is by the injury materially aggravated or accelerated, resulting in disability or death earlier than would have otherwise occurred, and the disability or death does not result from the disease alone progressing naturally as it would have done under ordinary conditions, but the injury, aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the compensation acts. *Madden's Case* (1916), 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D 1000; *Brightman's Case* (1914), 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A 321, and note 293; *Fisher's Case* (1915), 220 Mass. 581, 108 N. E. 361; *Crowley's Case* (1916), 223 Mass. 288, 111 N. E. 786; *Ramlow v. Moon Lake Ice Co.* (1916), 192 Mich. 505, 158 N. W. 1027, L. R. A. 1916F 955; *Hills v. Oval Wood Dish Co.* (1916), 191 Mich. 411, 158 N. W. 214; *Milwaukee v. Industrial Commission* (1915), 160 Wis. 238, 151 N. W. 247; *Hartz v. Hartford Faience Co.* (1916), 90 Conn. 539, 97 Atl. 1020; *Robbins v. Original Gas Engine Co.* (1916), 191 Mich. 122, 157 N. W. 437; *Grove v. Michigan Paper Co.* (1915), 184 Mich. 449, 151 N. W. 554; *Hurley v. Construction Co.* (1916), 193 Mich. 197, 159 N. W. 311; *Winter v. Alkinson, etc., Co.* (1915), 88 N. J. Law 401, 96 Atl. 360; *Matter of Mazzarisi v. Ward* (1916), 170 App. Div. 868, 156 N. Y. Supp. 964; *Sullivan v. Industrial, etc., Co.* (1916), 173 App. Div. 65, 158 N. Y. Supp. 970; 1 Bradbury, Workmen's Compensation (2d ed.) 386.

In the case first cited the court was considering questions broader than those with which we are dealing, but much is said there that is applicable here, thus: "Yet it is the hazard of the employment acting upon the particular employee in his condition of health and not what that hazard would be if acting upon a healthy employee or upon the average employee. The act

makes no distinction between wise or foolish, skilled or inexperienced, healthy or diseased employees. All who rightly are describable as employees come within the act. * * * It (the act) does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment, or collateral to it. Not every diseased person suffering a misfortune while at work for a subscriber is entitled to compensation. The relief is so new that the tendency may be to inquire only as to the employment and the injury and to assume that these two factors constitute ground for compensation. But the essential connecting link of direct causal connection between the personal injury and the employment must be established before the act becomes operative. The personal injury must be the result of the employment and flow from it as the inducing proximate cause. The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery. In passing upon this question, an humanitarian emotion ought not to take the place of sound judgment in the weighing of evidence. The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being. A high degree of discrimination must be exercised to determine whether the real cause of an injury is disease or the hazard of the employment. A disease, which under any rational work is likely to progress so as finally to disable the employee, does not become a 'personal injury' under the act merely because it reaches the point of disablement while work for a subscriber is being pursued. It is only when there is a direct causal connection between the exertion of the employment and the injury that an award of compensation can be made.

The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. In the former case, no award can be made; in the latter, it ought to be made."

We determine each of the submitted questions in the affirmative.

NOTE.—Reported in 116 N. E. 842. Workmen's compensation: what constitutes total disability under act, Ann. Cas. 1917E 240; disease as an incident within meaning of act, 2 Ann. Cas. 140, 15 Ann. Cas. 886, Ann. Cas. 1913A 1121, 1918B 309.

NATION ET AL. v. GREEN, EXECUTOR, ET AL.

[No. 9,284. Filed June 26, 1917.]

1. COURTS.—*Jurisdiction of Subject-Matter.—Right to Question.*—Jurisdiction of the subject-matter is conferred only by law, and the jurisdiction of the appellate court to decide a case may be questioned even after decision. p. 137.
2. COURTS.—*Jurisdiction.—Judgment.*—Where the Appellate Court is without jurisdiction in an appeal, anything it may do will be a nullity. p. 138.
3. COURTS.—*Transfer of Cases.—Effect.—Jurisdiction.*—Where a petition to transfer raised the question of the jurisdiction of the Appellate Court to review a case, the action of the court in transferring the case to the Supreme Court was an express holding that jurisdiction was in that court, and assumption of jurisdiction by the Supreme Court was at least an implied holding to the same effect. p. 138.
4. COURTS.—*Supreme Court.—Jurisdiction.—Appeals from Interlocutory Orders.—Statute.*—Under §1392d, cl. 16, Burns 1914, Acts 1907 p. 237, providing that appeals from interlocutory orders for the delivery of the possession of real property or the sale thereof shall be taken directly to the Supreme Court, the Supreme Court has exclusive jurisdiction in an appeal from an interlocutory order for the sale of a decedent's real estate on petition of the executors. p. 139.
5. APPEAL.—*Parties.—Improper Designation.—Statute.*—Under §1 of the act of 1917, Acts 1917 p. 523, providing that parties named in an appeal shall be properly before the court for all purposes, whether they are named as appellants, or appellees, and that the improper designation of parties shall not affect

the jurisdiction of the court, the Appellate Court would be required, if it had jurisdiction in an appeal, to set aside an order of dismissal, made because a party appellee had been named as an appellant, and decide the case on its merits. p. 140

From Howard Circuit Court; *Joseph Combs*, Special Judge.

On petition to transfer to Supreme Court. *Transfer granted.*

Harness & Moon, for appellants.

Blackledge, Wolf & Barnes and *R. L. Ewbank*, for appellees.

HOTTEL, C. J.—Since the filing of the opinion herein dismissing the appeal, counsel for appellee have filed a petition in which they suggest that the jurisdiction of the appeal is in the Supreme Court, and ask that the case be transferred to that court, under §1397 Burns 1914, Acts 1901 p. 568.

Appellants have filed a response to said petition in which they concede the correctness of appellee's contention and say in effect that the appeal was taken by them to this court under a misapprehension of the method of transfer by which the two cases of *Daniels v. Bruce* (1911), 176 Ind. 151, 701, 95 N. E. 569, 577, reached the Supreme Court, they thinking that said cases were transferred from this court under §1394, cl. 2, Burns 1914, Acts 1901 p. 567, when in fact such transfer was made under §1397 Burns 1914, *supra*.

It is, in effect, conceded by both parties that if by acts and conduct jurisdiction could be conferred or waived, it has been done in this case. However,

1. jurisdiction of the subject-matter is conferred by law only, and the parties are strictly within their rights and duties in presenting the question even at this late day. However, in view of the fact that, for reasons hereinafter indicated, there is some room for doubt

as to the question of jurisdiction, and in view of the fact that clause 2, §1394, *supra*, furnishes an opportunity to either party to transfer the case to the Supreme Court for its final determination of any question, jurisdictional or otherwise, decided by this court which contravenes a ruling precedent of the Supreme Court, we would be inclined to allow our judgment of dismissal to stand and let the parties pursue the remedy last indicated; but, for reasons which will appear later in the opinion, the judgment of dismissal must in any event be set aside and the case determined on its merits. This being

true, it becomes important to have the question

2. of jurisdiction properly determined in advance, because if this court is without jurisdiction, anything it may hereafter do, as well as the things which it has already done, will be a nullity. *Doctor v. Hartman* (1881), 74 Ind. 221; *McCoy v. Able* (1892), 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Huber v. Beck* (1892), 6 Ind. App. 47, 32 N. E. 1025.

The cases of *Daniels v. Bruce*, *supra*, upon which the parties base their claim that jurisdiction of this appeal is in the Supreme Court, were consolidated and

3. decided by this court, January 26, 1911. *Daniels v. Bruce*, 93 N. E. 675. A petition for rehearing was overruled, after which appellees filed in the Supreme Court a petition to transfer the causes to that court under §1394, cl. 2, Burns 1914, *supra*. They, on the same day, filed in this court a petition asking it to set aside all proceedings had in said consolidated causes and to transfer such causes to the Supreme Court under §1397 Burns 1914, *supra*, alleging in said petition facts which they claimed showed that jurisdiction of said cases was conferred on the Supreme Court by §1392, cl. 16, Burns 1914, Acts 1907 p. 237. This court thereupon set aside its opinion and all proceedings had in said consolidated cases, and transferred them to the

Supreme Court, under said §1397, *supra*. It was by this method that the cases reached the docket of the Supreme Court. The latter court assumed jurisdiction of them and decided them. The action of this court on the petition to transfer said cases was an express holding by it that jurisdiction of said consolidated cases was in that court, and the assumption of jurisdiction of said cases by the Supreme Court was, under the circumstances, at least an implied holding to the same effect.

The judgments appealed from in these cases and in the instant case are identical in character in the sense that they are each a judgment or interlocutory order for the sale of real estate made on a petition to sell real estate to make assets to pay the debts of an estate of a decedent, the petition in that case being by the administrator, *de bonis non*, with the will annexed, while in this case it is by the executor of the will of the decedent.

In characterizing the appeal in said cases, the Supreme Court, by Cox, J., said: "This is an appeal from an interlocutory order for the sale of real es-

4. state," etc. We find nowhere in the statute any jurisdiction conferred on this court in the matter of appeals from interlocutory orders. Such jurisdiction is conferred exclusively on the Supreme Court by clauses 15 to 18, inclusive, of §1392 Burns 1914, *supra*. Clause 16 expressly provides for appeals from "interlocutory orders for the delivery of the possession of real property or the sale thereof." There has been no change or amendment of the law since said decisions that in any way affects jurisdiction of actions of this character. For another case where the Supreme Court has assumed jurisdiction in cases involving appeals from such orders, see *Ditton v. Hart, Admx.* (1911), 175 Ind. 585, 95 N. E. 119.

We think that, in so far as the instant case is an appeal from such an order, jurisdiction thereof is clearly in the Supreme Court. It should be stated, however, in this connection, that in the instant case the matters really litigated and determined below, which enter into the judgment appealed from and in fact constitute the part thereof which the appeal seeks to have reviewed, were, in a sense at least, collateral to the proceedings to sell real estate, in that they were in the nature of claims against such estate which, prior to said proceedings, had never been allowed by the executors, or filed for allowance by such executors, or in any way presented to the trial court for its allowance thereof in the manner recognized by law.

As before indicated, but for the fact that such matters enter into the judgment appealed from and present the real questions involved in the appeal, we would have no doubt but that, under the statute and the authorities above cited, jurisdiction of this appeal is in the Supreme Court; and while such fact might furnish some reason for holding that jurisdiction of this appeal is in this court, we feel that, in as much as the final determination of such question is with the Supreme Court, it should be determined in advance of our taking any further steps in the case.

We have already indicated that our former judgment dismissing the appeal should be set aside. This is so because petitions for rehearing have been filed

5. by both parties and our investigation of these petitions and, in connection therewith, of the act concerning civil procedure passed by the last legislature (Acts 1917 p. 523) convinces us that a rehearing must be granted and the case decided on its merits. This is so because the dismissal of the appeal was based upon the fact that a party who was a necessary appellee had been made an appellant instead of an appellee.

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Section 1 of the act just mentioned provides as follows: "That in all appeals now pending in the supreme or appellate courts of Indiana, or hereafter taken to either of such courts, the parties named in such appeals shall be properly before the court for all purposes, whether such parties be named as appellants or appellees, and the fact that one or more parties are named as appellants when they should be appellees, or appellees when they should be appellants, shall not affect the jurisdiction of the court." This act would require this court, if it had jurisdiction of the appeal, to set aside its former order of dismissal and decide the case on its merits. However, as before stated, if the court had no jurisdiction of the appeal, any opinion upon the merits of the case would be a nullity.

For the reasons indicated, the order of dismissal of the appeal heretofore made is set aside, and the opinion therein withdrawn, and the case transferred to the Supreme Court under §1397 Burns 1914, *supra*. This action of the court renders unnecessary any further or separate action on the petitions for rehearing.

NOTE.—Reported in 116 N. E. 840. Executors and administrators: sale of real estate, parties and procedure, 18 Cyc 704, 743, 754, 755, 80 Am. St. 100.

LAKE MICHIGAN WATER COMPANY v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

[No. 9,832. Filed June 27, 1917.]

1. JUDGMENT.—*Final Judgment*.—A final judgment is one that disposes of all the issues, as to all the parties, presented by the pleadings, to the full extent of the power of the court to dispose of the same, and terminates the case as to all of such parties and issues. p. 143.
2. APPEAL.—*Right to Appeal*.—*Final Judgment*.—*Statute*.—Under §324 Burns 1914, §320 R. S. 1881, providing that in an action against defendants severally liable, plaintiff may pro-

ceed against those served, and afterwards proceed against those not served, where, in an action against two defendants, principal and surety, service was obtained only on the surety, judgment entered on the sustaining of the surety's demurrer to the complaint and plaintiff's refusal to plead further was a final judgment from which an appeal will lie, though the case was continued as to the defendant not served, since the judgment rendered adjudicates all the issues presented by the pleadings as to all the parties actually before the court. p. 145.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by the Lake Michigan Water Company against the United States Fidelity and Guaranty Company and another. From a judgment for defendant named, the plaintiff appeals, and appellee files motion to dismiss the appeal. *Motion to dismiss overruled.*

Collins & Collins and Anderson, Parker. Crabill & Crumpacker, for appellant.

Kenefick & Kenefick and McInerney, Yeagley & McVicker, for appellee.

FELT, J.—The appellee has moved to dismiss this appeal for the following reasons: (1) No final judgment has been rendered in the case from which an appeal may be taken. (2) The cause of action is still pending in the St. Joseph Circuit Court against one of the defendants, M. H. McGovern Company. (3) The M. H. McGovern Company was made a defendant in said cause and summons was issued for it, and on motion of appellant the cause was continued for service on said defendant, and is still pending.

The record shows that appellant filed its complaint in the Laporte Superior Court against M. H. McGovern Company, a corporation, and the United States Fidelity and Guaranty Company, on June 5, 1914, and ordered summons issued for both of such defendants, returnable June 17, 1914. The return of the sheriff shows service

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on the United States Fidelity and Guaranty Company but not on the M. H. McGovern Company. On motion of the United States Fidelity and Guaranty Company a change of venue was taken and the cause was transferred to the St. Joseph Circuit Court, where a second amended complaint was filed against both of said defendants, to which a demurrer by the United States Fidelity and Guaranty Company for insufficiency of facts alleged to state a cause of action against it, was sustained. The plaintiff, the appellant here, excepted to the ruling, elected to stand on its amended complaint, and refused to plead further. Thereupon the court rendered judgment that plaintiff take nothing by its complaint, and that the United States Fidelity and Guaranty Company recover its costs. "And this cause is now continued as to M. H. McGovern Company. And the plaintiff herein now prays an appeal to the Appellate Court of Indiana." The appeal was granted and appellant filed an appeal bond payable to United States Fidelity and Guaranty Company and M. H. McGovern Company.

A final judgment is one that disposes of all the issues, as to all the parties involved in the suit, presented by the pleadings, to the full extent of the power of

1. the court to dispose of the same, and puts an end to the particular case as to all of such parties and all of such issues. *Neyens v. Flesher* (1906), 39 Ind. App. 399, 402, 79 N. E. 1087; *Wehmeier v. Mercantile Banking Co.* (1911), 49 Ind. App. 454, 456, 97 N. E. 558; *Northern, etc., Cable Co. v. Peoples Mut. Tel. Co.* (1915), 184 Ind. 267, 111 N. E. 4. Section 317 Burns 1914, §314 R. S. 1881, provided that: "A civil action shall be commenced, by filing in the office of the clerk a complaint, and causing a summons to issue thereon; and the action shall be deemed to be commenced from the time of issuing the summons, but as

to those against whom publication is made, from the time of the first publication."

Appellant resists the motion to dismiss the appeal on two grounds, viz.: (1) The M. H. McGovern Company is a foreign corporation and the action was not commenced as to it and could not be except by publication of notice. (2) The fact that a person's name is inserted in a complaint does not make him a party to the suit.

This is an action to recover damages on a contractor's bond given to secure the performance of a contract to install an intake pipe connecting appellant's pumping station and a crib in Lake Michigan near Michigan City, Indiana. It is alleged that the M. H. McGovern Company, the contractor, failed to perform its contract and the complaint demands a money judgment against it and the surety, the United States Fidelity and Guaranty Company. It is averred in the complaint, and the bond sued upon shows that the M. H. McGovern Company is an Illinois corporation. Section 319 Burns 1914, Acts 1893 p. 153, authorizes the service of process upon certain officers of either a domestic or foreign corporation, in certain instances, when found in this state. Section 322 of the same statute (Acts 1885 p. 155), on order of court or on verified application, authorized the giving of notice by publication in certain instances, the first of which is "where the defendant is a foreign corporation and has property within the state, or the cause of action arose therein." No application was made in this case for notice by publication. No relief is sought in the complaint except a personal judgment, and the fact that notice by publication would not authorize the taking of such judgment may reasonably be presumed to show why no such notice was given. Section 324 Burns 1914, §320 R. S. 1881), provides the method of procedure where the ac-

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tion is against two or more defendants and service is only obtained on part of them. The obligation

2. in this case falls within the second subdivision of said section, which provides that: "If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants, and may afterwards proceed against those not served." This statute authorized the procedure in the case at bar. Although it preserves the right of the plaintiff to afterward proceed against defendants not served, the court cannot know that such right will be invoked, and is not authorized to assume that it will be, and on such presumption to treat the judgment as otherwise than final and appealable under the statute. The plaintiff had the right to proceed to final judgment against the defendant served with process, and had it obtained judgment in its favor, in the absence of an appeal, could have enforced it immediately against such defendant without further procedure against the defendant not served with process. The fact that the judgment obtained in this instance was in favor of the defendant actually in court does not alter the case, and on the face of the record such judgment is final and appealable because it adjudicates all the issues presented by the pleadings as to all the parties actually before the court, and in so far as the court can know, ends the litigation.

The facts of this case seem to indicate good reasons for the enactment of the statute and for such interpretation of it, for it is quite apparent that the plaintiff will not at any time seek to proceed in this jurisdiction against the McGovern company, a foreign corporation, to obtain a personal judgment against it not authorized by the law. We do not find that the question presented and decided has previously been passed upon by this

court or by our Supreme Court, but as tending to support the conclusions announced we cite the following: §§594, 595 Burns 1914, §§568, 569 R. S. 1881; 1 Works Practice (2d ed.) §121; *Hassler v. Hefe* (1898), 151 Ind. 391; 394, 50 N. E. 361; *Louisville, etc., R. Co. v. Treadway* (1895), 143 Ind. 689, 702, 40 N. E. 807, 41 N. E. 794; *Lower v. Franks* (1888), 115 Ind. 334, 337, 17 N. E. 630; *Carmien v. Whitaker* (1871), 36 Ind. 509, 510; *Davis, etc., Mfg. Co. v. Hillsboro Creamery Co.* (1893), 9 Ind. App. 553, 37 N. E. 294; *Hogan v. Robinson* (1884), 94 Ind. 138, 140; *Brannock v. Stocker* (1881), 76 Ind. 573, 574.

For the reasons above announced the motion to dismiss the appeal should be and is hereby overruled.

NOTE.—Reported in 116 N. E. 744.

IN RE CARROLL.

[No. 9,951. Filed June 27, 1917.]

1. **MASTER AND SERVANT.—*Workmen's Compensation Act.—Construction.*—*Dependents.*—*Presumptions.***—Under §38 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that a wife living with a husband at the time of his death, and a child under the age of eighteen living with a parent at the time of his or her death, there being no surviving parent, shall be conclusively presumed to be wholly dependent for support upon deceased, but in all other cases dependency shall be a question of fact, a wife or child or both may be conclusively presumed to be wholly dependent, or, on inquiry into the facts, may be found to be either wholly or partially dependent, and where the situation exists that gives rise to the presumption that the wife or child is wholly dependent, there can be no further inquiry, regardless of what the real facts are, but, in order that such situation may arise in favor of a wife, she must be living with her husband at the time of his death, and in order that such conclusive presumption may be indulged in favor of a child, it must be less than eighteen years of age, must be living with the parent at the time of his death, and there must be a surviving parent either conclusively presumed

- to be wholly dependent or found to be either wholly or partially dependent. p. 151.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Dependency.—Question of Fact and Law.—Appeal.*—Questions of dependency, as the term is used in the Workmen's Compensation Act (Acts 1915 p. 392), are, where no conclusive presumption of dependency arises under the act, mixed questions of law and fact, and it is the exclusive province of the Industrial Board to determine the facts and draw legitimate inferences therefrom and to determine in the first instance from the facts and inferences whether dependency exists, but the action of the board in the latter respect is reviewable by the Appellate Court when an appeal is taken under §61 of the act. p. 153.
 3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Dependency.—Burden of Proof.*—In a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, by one seeking an award as a dependent, the burden is on the claimant to establish by evidence the facts showing dependency. p. 153.
 4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Dependent.*—Generally, a dependent, within the meaning of workmen's compensation acts, is one who looks to another for support, or is in fact dependent, or relies on another for the reasonable necessities of life, and in determining dependency the inquiry should not be confined to the question whether the family of the deceased workman could have supported life without any contributions from him, or whether such contributions were absolutely necessary to the reasonable maintenance of the family, but rather the inquiry should include the question whether his contributions were looked to, depended and relied on, in whole or in part, by the family for means of reasonable support. p. 153.
 5. MASTER AND SERVANT.—*Workmen's Compensation Act.—Dependency.—Elements.*—Among the elements that are indicative of a state of dependency, within the Workmen's Compensation Act (Acts 1915 p. 392), are an obligation to support, the fact that contributions have been made to that end, that the claimant in any case is shown to have relied on such contributions and their continuing, and the existence of some reasonable grounds as a basis for a probability of their continuance or a renewal thereof if interrupted, although it is not necessary to a state of dependency that all of such elements must exist, but, as a rule, subject to certain exceptions, the fact that contributions have been made is an essential element of dependency within the meaning of the act. p. 154.
 6. MASTER AND SERVANT.—*Workmen's Compensation Act.—Dependency.—Evidence.—Sufficiency.*—In a proceedings for an

award for the death of a servant under the Workmen's Compensation Act, Acts 1915 p. 392, evidence, when aided by proper deductions, showing that decedent's widow and children did not live with him for a number of years immediately preceding his death, that deceased during such time made contributions to his family, irregular both as to intervals and amounts, and that the wife was furnishing the substantial means of support, is not sufficient to establish, as a matter of law, that either the wife or the children were wholly dependent on decedent for support. p. 154.

7. **MASTER AND SERVANT.—Workmen's Compensation Act.—Partial Dependency.—Evidence.—Question for Industrial Board.**—In a proceeding for an award for the death of a servant under the Workmen's Compensation Act, Acts 1915 p. 392, where the wife had attempted to require her husband to discharge his legal obligation to support his family, which lived apart from him but had been only partially successful, her efforts to some extent indicate a reliance on contributions from him to aid her in supporting herself and children, and where for a number of years immediately preceding the husband's death his contributions to the family's maintenance were irregular both as to intervals and amounts, and the wife was furnishing the substantial means of support, such facts are not conclusive that a state of dependency did not exist and are sufficient to present to the Industrial Board for determination as a question of fact whether the wife, or children, or both, were partial dependents. p. 155.
8. **HUSBAND AND WIFE.—Support of Family.—Husband's Duty.**—A husband and father is under both a common-law and a statutory obligation to support his wife and children. p. 156.
9. **MASTER AND SERVANT.—Workmen's Compensation Act.—Determination of Compensation to Partial Dependent.**—Under the Workmen's Compensation Act, Acts 1915 p. 392, in determining the amount of compensation to be paid a partial dependent, the inquiry respecting the amount contributed by the deceased employe to such partial dependent is not limited to the time of the injury, but the entire period during which contributions were made may be considered. pp. 156, 157.

From the Industrial Board of Indiana.

Certified question of law.

Proceedings under the Workmen's Compensation Act in the matter of one Carroll. Questions of law certified by the Industrial Board. *Questions answered.*

CALDWELL, J.—Under the provisions of §61 of the Workmen's Compensation Act (Acts 1915 p. 392), the Industrial Board has certified to this court certain questions of law based upon the facts presented by a proceeding pending before that body, seeking the opinion of this court for guidance in determining such proceeding. The substance of the statement of facts as formulated by the board, and wherein the employe involved is designated as A and the employer as B, is as follows: November 10, 1916, A, while in B's employ, received a personal injury from which he died the next day, the circumstances being such as to authorize an award, provided his widow and children were at the time dependents within the meaning of the act. His wages averaged \$10.64 per week. A was married to the widow claimant in the city of New Orleans, Louisiana, January 26, 1903. They were not divorced. A left surviving him also, as the fruits of such marriage, a son and daughter, aged respectively eleven and nine years. By reason of A's intemperate habits and vicious disposition, his wife was compelled to and did separate herself from him about nine years prior to his death, and after such separation she did not live with him except in the month of August, 1914. She was justified in not living with A, but A was not justified in living apart from her. At sometime after August, 1914, A came to Indianapolis, where he was injured and died. His wife and children remained in New Orleans. While A lived with his wife and children he supported them only in part. During that time his wages averaged about nine dollars per week, of which he gave to his wife per week sums varying from three to nine dollars. The wife by her own labor largely supported both herself and children throughout her entire married life. During August, 1914, while A was living with his family, he contributed somewhat to their support. For a time

after August, 1914, A remained in New Orleans and worked at intervals. Within the period when A was living apart from his family, and especially while he remained in New Orleans, following August, 1914, if the children were able to locate him on pay days, he occasionally bought shoes for them, and gave them money not exceeding seventy-five cents at any one time. The amount of money which he gave to his wife within the period of their married life did not average to exceed \$25 per year. The amount contributed to his children while he was living apart from his wife after August, 1914, did not exceed \$12 per year. In 1908, the wife, proceeding under a Louisiana statute, procured an order of court against A that he pay to her three dollars per week for the support of herself and children. A complied with the order for about six months, but thereafter made no further payments, and moved from place to place that he might avoid any process of court directed to the enforcement of the order. In September, 1914, the wife, by a proceeding under another Louisiana statute, procured an order of court that A pay to her \$2.50 per week for the support of the children. A, being released on his own recognizance, failed entirely to comply with the order.

Upon the facts, the board submits questions as follows: Under the provisions of the Workmen's Compensation Act (1) Was the wife a dependent, and if so, was such dependency total or partial? (2) Were the children dependents, and if so, was such dependency total or partial.

In considering these questions, there are certain facts not clearly appearing, which we shall assume: Thus, that A's contributions to the support of his wife and children were only as specifically stated; that a statement to the effect that within a named time A gave to his wife and children certain sums of money, or not ex-

ceeding certain sums, or bought for them certain articles, means that within such time he made no further or other contributions to their support; that he made no contributions to his wife after he finally left New Orleans, sometime after September, 1914, apparently soon thereafter.

The provisions of the Workmen's Compensation Act, *supra*, specially applicable are as follows: "Sec. 38: The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employe: (a) A wife upon a husband with whom she lives at the time of his death. * * * (c) A boy under the age of 18, or a girl under the age of 18 upon the parent with whom he or she is living at the time of the death of such parent, there being no surviving dependent parent. * * * In all other cases, questions of dependency in whole or in part shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases if there is more than one person wholly dependent, the death benefit shall be divided among them; and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency."

It will be observed that, under the provisions of §38, *supra*, a wife or a child or both may be conclusively presumed to be wholly dependent, or on an in-

1. quiry into the facts may be found to be either wholly or partially dependent. Where the situation exists that gives rise to the presumption, there can be no further inquiry regardless of what the real facts are. In order that such situation may arise in favor of a wife, she must be living with her husband at the time of his death. In order that such conclusive pre-

sumption may be indulged in favor of a child, such child must be less than eighteen years of age, must have been living with the involved parent at the time of his death, and there must not be a surviving parent either conclusively presumed to be wholly dependent or found to be either wholly or partially dependent.

Under the facts here, it does not appear that either the wife or the children were living with the husband and father at the time of his death. It follows that a conclusive presumption of total dependency cannot be indulged in favor of either. See the following decided under statutes identical with or very similar to ours on the subject under consideration: *Nelson's Case* (1914), 217 Mass. 467, 105 N. E. 357; *Gallagher's Case* (1914), 219 Mass. 140, 106 N. E. 558; *Bentley's Case* (1914), 217 Mass. 79, 104 N. E. 403; *Northwestern Iron Co. v. Industrial Commission, etc.* (1913), 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A 366, and note at 370, Ann. Cas. 1915B 877; *Finn v. Detroit, etc., Railway* (1916), 190 Mich. 112, 155 N. W. 721, L. R. A. 1916C 1142, Ann. Cas. 1915B 377, and note. Since the decision of the above cases cited from Massachusetts, the Workmen's Compensation Act of that state has been amended, extending the effect of a conclusive presumption of total dependency in favor of a wife to a case where it is found that at the time of her husband's death she was living apart from him for justifiable cause, or because he had deserted her. (Mass. St. 1914 c. 708, §3.) Our act does not contain a similar provision.

We proceed to the question of dependency unaided by conclusive presumption: The provisions of the act applicable here, as already stated, are as follows: "In all other cases, questions of dependency in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury."

We have hereinbefore set out the facts. Are those facts sufficient to establish dependency in favor of either the wife or the children? Whether one

2. person is dependent on another within the meaning of that term as used in workmen's compensation acts, is usually held to be a question of fact. *Fierro's Case* (1916), 223 Mass. 378, 111 N. E. 957; *Newman's Case* (1916), 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C 1145; *Veber's Case* (1916), 224 Mass. 86, 112 N. E. 485; *Gallagher's Case*, *supra*; *Finn v. Detroit, etc., Railway*, *supra*. It is perhaps more accurate to say that questions of dependency are mixed questions of fact and law, since the ultimate question of what constitutes dependency is a law question. It is the exclusive province of the board to determine the facts and to draw legitimate inferences therefrom. It is the province of the board also in the first instance to determine from such facts and inferences whether dependency exists, but as such latter process involves a law question, the action of the board in such respect is reviewable by this court when an appeal is taken under §61 of the Workmen's Compensation Act.

3. In each case, the burden is on the claimant to establish by evidence, direct, circumstantial, or both, the facts showing dependency. *Fierro's Case*, *supra*; *Ohio Bldg. Vault Co. v. Industrial Board* (1917), 277 Ill. 96, 115 N. E. 149.

Our act does not define dependency, and does not specifically indicate who are dependents, except as to persons included within the conclusive presump-

4. tion of total-dependency features of the act.

Courts as a rule, in determining questions of dependency and who are dependents, resort to description, to an outlining of the elements rather than to definition. Stated generally, a dependent is one who looks to another for support and maintenance; one who is in

fact dependent; one who relies on another for the reasonable necessities of life. *Jackson v. Erie R. Co.* (1914), 86 N. J. Law 550, 91 Atl. 1035; *Matter of Tirre v. Bush Terminal Co.* (1916), 172 App. Div. 386, 158 N. Y. Supp. 883.

To confine the inquiry to the question whether the family of the deceased workman could have supported life without any contributions from him, or whether such contributions were absolutely necessary in order that the family might be reasonably maintained, is not a fair test of dependency; but rather the inquiry should include the question whether contributions from the workman were looked to, depended and relied on, in whole or in part, by the family for means of reasonable support. *Howells v. Vivian & Sons* (1902), 85 L. T. 529; *Powers v. Hotel Bond Co.* (1915), 89 Conn. 143, 93 Atl. 245.

Among the elements that are *indicia* of a state of dependency are: an obligation to support; the fact that contributions have been made to that end; that

5. the claimant in any case is shown to have relied on such contributions and their continuing; and

the existence of some reasonable grounds as a basis for probability of their continuance or of a renewal thereof if interrupted. We would not be understood as indicating that all these elements must exist in each case in order that there may be a state of dependency. As a rule, to which there are exceptions, however, the fact that contributions have been made is an essential element of a state of dependency within the meaning of the act. L. R. A. 1916A, notes 121, 248.

Here the facts have been submitted to us. We have said that ordinarily it is the exclusive province of the Industrial Board to deduce inferences from

6. proven facts. An analysis of these facts might lead to certain conclusions under which de-

pendency here becomes a question of law: Thus, if such facts establish conclusively the existence or the nonexistence of dependency, or if they are insufficient to establish such a state, then dependency becomes a law question; or if such facts, of themselves and unaided by inference, are not sufficient to establish anything on the subject of dependency, and if they are reasonably susceptible of only harmonious inferences—that is, inferences all tending to indicate a state of dependency or the opposite, then also dependency becomes a law question, as under such circumstances this court may draw the inferences that arise inevitably from the facts and, having done so, it ultimately becomes the province of this court to determine dependency as a law question. It is our judgment that the facts here, when aided by all proper deductions, are not sufficient to establish that either the wife or the children were wholly dependent on the deceased employe for support. Such is our opinion as matter of law. *Fierro's Case, supra; Newman's Case, supra; Nelson's Case, supra; Finn v. Detroit, etc., Railway, supra; Northwestern Iron Co. v. Industrial Commission, etc., supra.*

There was no time when the deceased employe either fully or substantially supported his wife or his children. For the most part, the wife by her own

7. labor throughout her entire married life maintained both herself and her children. For a number of years immediately preceding his death, the workman contributed very irregularly and in amounts comparatively trivial. There is no statement included in the facts that his contributions approached sufficiency for the support of his family, and in fact the contrary appears. The situation at the decease of the workman, viewed in the light of the past, did not warrant either the wife or the children in looking entirely

to him for maintenance. Hence it is our judgment that neither the wife nor the children were wholly dependent on the deceased husband and father for support. It does not follow, however, that they may not have been partially dependent within the meaning of the act. This question, as well as the question of actual total dependency, must be "determined in accordance with the fact, as the fact may be at the time of the injury." §38, *supra*. At the time of the injury, the employe

was regularly employed at a weekly wage of

8. \$10.65. He rested under both a common-law and a statutory obligation to support his wife and children. There is a moral obligation to

9. that end also which the average man cheerfully discharges, and to the promptings of which even the most careless or indifferent may eventually bend a listening ear. The wife had shown a disposition to require her husband to discharge his legal obligation to his family. She had met with indifferent success, but her efforts to some extent perhaps indicate a reliance on contributions from him to aid her in supporting herself and children. For a number of years immediately preceding his death, his contributions were, as we have said, irregular both as to intervals and amounts. The wife was furnishing the substantial means of support. These facts, however, are not conclusive that a state of dependency did not exist. 1 Honnold, Workmen's Compensation 71. *Powers v. Hotel Bond Co.*, *supra*; *Kennerson v. Thames Towboat Co.* (1915), 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A 436; *Smith v. Sash & Door Co.* (1915), 96 Kan. 816, 153 Pac. 533.

Apparently the father continued his irregular contributions for the support of his children up to the time of his decease. He, however, apparently for some months had contributed nothing directly to his wife's support. In our judgment, all the foregoing consti-

tuted elements of the fact "as the fact may be at the time of the injury," in that they were component parts of the actual situation.

"Where there is a direct legal obligation to support, as in case of a father to his minor children, coupled with a reasonable probability of such obligation being fulfilled, dependency is established, even though no support was in fact being furnished at the time of the workman's death. The law does not limit dependency of minor children living apart from their parents to cases where actual support was being furnished or contributions made, as such rule would in many instances exclude children from the benefits of a law that was clearly intended for their protection." 1 Honnold, Workmen's Compensation §82.

It is apparent from what we have said that we can give no opinion whether the facts here, as matter of law, establish that the wife or the children were or were not partially dependent on the deceased employe for support within the meaning of the act. We think it is plain that the facts do not conclusively show dependency. It is the province of the board, as we have said, primarily to determine the question of whether dependency exists in a given case. It is our opinion that the facts here, although not strong, are sufficient for the consideration of the board in order that it may be determined whether the wife or children or both depended and relied on contributions from the deceased for support, and whether they had reasonable grounds to do so, and consequently whether a state of partial dependency existed.

A further problem not included in the questions submitted to us is suggested by the facts presented. Section 37 of the act, *supra*, provides for the distribution of the death benefits where the injury results in death within 300 weeks, to the effect that

there shall be paid to persons wholly dependent for a designated period, a weekly compensation equal to fifty-five per cent. of the deceased's average weekly wages, and that if the deceased employe leaves only persons partially dependent, "the weekly compensation to those dependents shall * * * be in the same proportion to the weekly compensation for persons wholly dependent, as the amount contributed by the deceased employe to such partial dependent bears to his annual earnings at the time of the injury." It will be observed that in determining the amount to be paid to persons partially dependent, three elements are to be considered: First, the annual earnings of the deceased at the time of his injury; secondly, the amount that would be paid to a person wholly dependent under the same circumstances; thirdly, the amount contributed by the deceased employe to such partial dependent. The inquiry respecting the third element is not limited to the time of the injury. The section reads "contributed," rather than "being contributed." It is our judgment that, in determining the third element, the entire period during which or within which contributions have been made may be considered.

NOTE.—Reported in 116 N. E. 844. Workmen's compensation: who is a "dependent" within meaning of act, L. R. A. 1916A 121, 248, Ann. Cas. 1913E 480, 1918B 749.

CHICAGO AND ERIE RAILROAD COMPANY v. HUNTER,
ADMINISTRATRIX.

[No. 9,064. Filed October 13, 1916. Rehearing denied December 20, 1916. Transfer denied June 27, 1917.]

1. RAILROADS.—*Crossing Accidents.—Contributory Negligence.—Complaint.—Sufficiency.*—In an action for the death of one killed in a railroad crossing accident by being run down by a cut of cars while attempting to go around a train which blocked the crossing, an allegation in the complaint that decedent was

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familiar with the crossing and its environments, especially when considered with other averments tending to show that his conduct was not different from that of a man of ordinary prudence, does not render the complaint demurrable as showing deceased guilty of negligence contributing to his injury, since on that issue the burden is on defendant, and a demurrer on that ground will be sustained only when the averments of the complaint show affirmatively, or necessitate the inference of, contributory negligence. p. 165.

2. RAILROADS.—*Crossing Accidents.—Contributory Negligence.—Evidence.—Instructions.*—In an action for death in a railroad crossing accident, an instruction that it could not be assumed in the first instance that decedent was guilty of contributory negligence, that the burden of that issue was on defendant and that it must be established by a preponderance of the evidence, is not objectionable as requiring defendant to prove contributory negligence by affirmative evidence, especially as another instruction informed the jury that in determining where the preponderance is on any issue, it should look to all the evidence in the case. p. 166.
3. RAILROADS.—*Street Crossings.—Blocking with Trains.—Statute.*—Although §2671 Burns 1914, Acts 1905 p. 747, makes it a misdemeanor for one in charge of a freight train to allow it to stand without an opening therein across a highway, it also imposes a duty on the railroad company not to block highway crossings with freight trains or cars. p. 169.
4. RAILROADS.—*Crossing Accident.—Instructions.—Negligence.—Proof.*—In an action for death in a railroad crossing accident, where negligence was predicated on the blocking of a highway crossing by a freight train and the negligent running of another train backward on an adjacent track, instructions do not authorize a recovery on proof of only one of the negligent acts complained of where each instruction respectively states what facts will authorize a finding that defendant is guilty of negligence in respect to each act charged, and that if decedent was killed by such negligence in respect to each act, defendant would be liable, "provided all the other material allegations of the complaint are proven." p. 170.
5. RAILROADS.—*Crossing Accidents. — Obstructing Crossing. — Duty to Give Signals of Approach of Another Train.*—Where a railroad company, in violation of a statute, obstructs a highway crossing with a standing freight train, and a traveler departs from the highway and goes upon the railroad's right of way adjacent to the crossing only for the purpose of going around the train and over the tracks to the street on the other side, he is not a trespasser as respects the railroad's duty to

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him to give the statutory signals of the approach to the crossing of a train on another track. p. 170.

6. **NEGLIGENCE.**—*Instructions.*—*Reasonable Care.*—*Jury Question.*—In an action for the death of a traveler who, while attempting to go around a train blocking a highway crossing, was run down by a train on another track, a requested instruction that if there were three routes, any of which decedent could have taken in passing around the obstructed train, one dangerous and the other two safe, decedent was guilty of contributory negligence if he took the dangerous way, was properly refused because it invaded the province of the jury, it being for the jury to determine from all the circumstances whether taking the dangerous way was negligence. p. 172.
7. **RAILROADS.**—*Crossing Accidents.*—*Action for Death.*—*Variance between Allegation and Proof.*—*Harmless Error.*—In an action against a railroad for death in a crossing accident under a complaint averring that decedent was struck by a train at the street crossing, and the evidence showed that he was killed on the railroad's right of way adjacent to the crossing while attempting to go around defendant's train, which he had a right to do because it was unlawfully obstructing the highway, the variance between allegation and proof was immaterial, where the complaint proceeded on the theory that decedent was on the crossing when injured in that defendant owed him the care which it owed to travelers generally on its crossing. p. 173.

From Kosciusko Circuit Court; *Francis E. Bowser*, Judge.

Action by Effie Hunter, administratrix of the estate of Joseph Hunter, deceased, against the Chicago and Erie Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

W. O. Johnson and *L. W. Royse*, for appellant.

Charles C. Campbell, *Widaman & Widaman* and *Edward E. Murphy*, for appellee.

HOTTEL, P. J.—On January 22, 1913, at about 6:30 p. m., Joseph Hunter, while attempting to walk across the tracks of appellant's railroad at an intersection of such tracks with a public street in the town of Leiter's Ford, in Fulton county, Indiana, was run over and killed by one of appellant's freight trains. His widow,

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Effie Hunter, was appointed administratrix of his estate, and as such brought an action against appellant in the Fulton Circuit Court to recover damages for herself and the minor children of said decedent, charging that decedent's death was caused by appellant's negligence. The case was venued to the Kosciusko Circuit Court, where a trial by jury resulted in a verdict in favor of appellee for \$4,000. From this judgment this appeal is prosecuted.

The complaint was in one paragraph, and was challenged below by a demurrer with proper memorandum filed therewith. This demurrer was overruled and exceptions properly saved. A motion for new trial filed by appellant was also overruled and exceptions saved. These rulings of the trial court are here assigned as error and relied on for reversal.

The complaint was challenged on the ground: (1) That it did not charge appellant with any negligence; (2) that it discloses by a fair inference that decedent was guilty of negligence contributing to his injury.

Inasmuch as the question which the appellant attempts to present by these grounds of its attack on the complaint lie at the bottom of most of the reasons urged in support of its contention that the court erred in overruling its motion for a new trial, we shall at this point indicate enough of the averments of the complaint to make clear such question, and shall then address ourselves to its disposition, instead of attempting to discuss and dispose of the various alleged erroneous rulings by which such question is attempted to be presented.

The complaint charges in effect that the public street in the town of Leiter's Ford which is here involved is about fifty feet wide and runs north and south; that three of appellant's tracks cross it at an angle of sixty

degrees; that such tracks are about eight feet apart—the one on the north being the main track, and the other two being sidetracks used for switching purposes; that all the land about and near the crossing is level and there are no fences or barriers to keep the traveling public within the limits of the street when crossing such tracks; that on a dark night it is impossible for the traveler on such highway to know his whereabouts on such crossing, whether in the center or at the side thereof, or on appellant's adjoining right of way; that the view of appellant's tracks both to the east and the west, by a traveler approaching said crossing from the south was obstructed by buildings and structures (particularly described) located on appellant's right of way, immediately south of its tracks; that the travel into said town from the south converges into said street at said crossing, which is the only crossing over said tracks into said town, and said crossing is much traveled by the public; that at the time of the occurrence complained of, and for more than twenty years previously thereto, the appellant had not maintained any fences or cattle guards at said crossing, but had thrown out to the public such crossing and the adjacent right of way thereto for travel; that at about 6:30 p.m., on January 22, 1913, appellant pulled a long freight train on the first sidetrack south of its main track, and permitted it to stand over and upon said crossing for a half hour and negligently failed to cut said train at the crossing, or to leave any space on said crossing open for public travel; that the said train extended twenty-five or thirty rods west of said crossing, and the caboose thereof was fifty feet east of the crossing; that at about seven o'clock p.m., and while said train was standing across said crossing on said first sidetrack south of the main track, appellant negligently backed a tender, an engine and two box cars from the west

over the second or south sidetrack; that the night was dark and there were no lights on or about said crossing, except those on the rear end of said caboose, which hindered rather than aided a view to the west; that appellant negligently backed said tender, engine and cars over said south sidetrack without any headlight or other light on the approaching end of said train, and, on account of the darkness, such train could not be seen by a traveler on or approaching said crossing; that said train was negligently backed over said crossing at the dangerous speed of twenty miles an hour without any brakeman or servant to give any warning of its approach, and without sounding the whistle or ringing the bell of the engine, etc., and "without giving any signals or warnings whatever of the approach of said train upon and over said crossing;" that at said time decedent, Joseph Hunter, was south of and approached said crossing with the intention of passing over it, and found it obstructed by said train on the first sidetrack; that decedent frequently passed over said crossing, was familiar with it and with its environments; that after waiting for said first train to clear said crossing for his passage, and after appellant had failed to clear the same, decedent started upon said highway across said tracks by traveling over the south track and around said caboose; that just as he had crossed the south rail of the south track and was about to step over the north rail thereof to go around said caboose, the appellant then, while still obstructing its first sidetrack, negligently backed said second train from the west down upon and over said crossing, as aforesaid, and down and over decedent, and knocked him down and killed him; "that the defendant * * * negligently ran said second train down upon and over said decedent and killed him, without any light whatever on the approaching end of said second train to give him any

warning, and without giving the statutory signals or giving any signals whatever to apprise him of the approach of said train, and without having any of its servants on the approaching end of said train * * *."

Appellant's theory of the complaint and its objections thereto, stated in its own language, is as follows: "It is the theory of this complaint that the two acts of negligence of the appellant, to wit: (1) the blocking of the crossing by the train on the middle track, and, (2) the backing of the train on the south track down upon the crossing and down upon deceased without a light upon its approaching end, and without giving signals of its approach, concurred in causing the death of decedent; that is, if the middle track had not been blocked and thereby delayed him he could have passed over the south track in safety, and if no train had been run over the south track he could have gone over it and around the rear end of the train on the middle track without receiving the injury which killed him. The two acts are essentially combined in producing the result complained of. It is appellee's theory, as outlined in her complaint, that when deceased found the crossing blocked by the train on the middle track, he had a right to leave the highway and go upon appellant's premises in order to pass around the rear end of the blocking train, and that appellant owed him the duty to care for his safety while he was so doing. We insist that the theory is unsound. We contend that if the deceased left the highway and went upon appellant's premises for the purpose of going around the blocking train, he at once became a trespasser to whom appellant owed no duty, except that it should not wantonly and wilfully run him down. But if it be said that this question does not arise upon the complaint, *since it avers that the collision was at the crossing,*

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then we insist that the complaint shows deceased guilty of contributory negligence in going upon the crossing."

We shall first consider appellant's contention that the complaint shows by fair inference that decedent was guilty of contributory negligence. It is, in

1. the main, based on the averment of the complaint that decedent was familiar with the crossing and its environments. Such averments, especially when considered in the light of the other averments, which show or tend to show that decedent's conduct was not different from that of a man of ordinary prudence, would not justify the court in saying, as a matter of law, that the complaint shows that decedent was guilty of negligence contributing to his injury. Upon such issue the defense has the burden, and it is only when the averments of the complaint are such as to affirmatively show, or necessitate the inference, that the plaintiff was guilty of such negligence, that a demurrer on such ground should be sustained. *Wabash R. Co. v. McNown* (1912), 53 Ind. App. 116, 135, 99 N. E. 126, 100 N. E. 383; *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 412, 413, 97 N. E. 822; *Cole v. Searfoss* (1911), 49 Ind. App. 334, 338, 339, 97 N. E. 345, and cases there cited.

Appellant, by its italicized words, *supra*, concedes away its contention that the complaint shows that decedent was a trespasser when injured. In any event, the theory of the complaint indicated by all of its averments is that decedent was a traveler on the street in question attempting to cross appellant's tracks when injured, and that the appellant owed to him the duties which it owed to all travelers over its public crossings, and that it negligently violated such duties by the acts of omission and commission therein set out. Upon this theory the averments are sufficient, under the authorities hereinafter cited.

However, the question suggested by appellant's contention, *supra*, is the controlling question involved in this appeal, and is squarely presented in appellant's discussion of the grounds of its motion for new trial, and will be there further considered.

In its discussion of the ruling on such motion, appellant challenges instruction No. 5, on the ground that it requires the appellant to prove contributory neg-

2. ligence by affirmative evidence. The instruction is not open to this criticism. It simply told the jury that it could not be *assumed* in the first instance that the decedent was guilty of contributory negligence; that the burden of such issue was on appellant; and that the same "*must be established by a preponderance of the evidence*," meaning necessarily the entire evidence and not that of appellant alone. Its wording is entirely different from the instructions condemned in the cases cited by appellant.

The court in several of its instructions repeated to the jury that the appellee could not recover if the jury found that the decedent had been guilty of negligence contributing to his injury, and in instruction No. 15 told the jury that "in determining where the preponderance of the evidence is on any fact or issue in dispute, *you will look to all the evidence in the case bearing on that fact or issue*, under the rules of weighing and considering the same heretofore given you, *without regard to which side offered the same.*" (Our italics.)

By instruction No. 6, the jury was told that the statutes of the state imposed upon railroad companies operating therein the following duties in reference to obstructing a highway crossing with freight trains or cars, to wit: (Here follows a copy of §2671 Burns 1914, Acts 1905 p. 747.)

Instruction No. 7 is as follows: "If you find from a preponderance of the evidence that the defendant com-

pany, through its conductor or other person in charge of the freight train in question, unnecessarily permitted such train at the time of the injury alleged to stand upon and over the highway crossing alleged without leaving a space of sixty feet or other space across such highway, whereby plaintiff's decedent could travel upon and across said railroad, as alleged, then the defendant would be guilty of negligence, and if you find the decedent was killed by reason of such negligence, and that damages resulted therefrom to the widow and minor children, if any there were, then the defendant would be liable in this action, *provided all the other material allegations of the complaint are proven*, and provided further that you do not find from a preponderance of the evidence that said decedent was himself guilty of contributory negligence."

Instruction No. 8 told the jury that the statute of the state imposes upon such companies the following duties in reference to sounding the whistle and ringing the bell for highway crossing, to wit: (Here follows a copy of §5431 Burns 1914, §4020 R. S. 1881.)

That part of instructions Nos. 9, 11 and 12 necessary to an understanding of the objections made to each respectively, as hereinafter indicated, are as follows:

"9. * * * And if you find that said decedent approached said crossing upon said highway and went upon the same and upon the track of said defendant, and while in such position upon said highway and crossing, a train approached from the west, not having given any of the signals required by law, whereby and by reason of such failure to give such signals he was overtaken and run upon and over and killed, then the defendant would be liable if the other material averments of the complaint have been proven by a preponderance of the evidence, and the decedent was without fault on his part, but the burden of proving that the decedent

did not use ordinary care and caution in approaching and crossing said railroad or said highway, if he did so approach and cross it, is upon the defendant."

"11. But if you find from a preponderance of the evidence that on the night of January 22, 1913, at about the hour of 6:30 p.m. the defendant company pulled a freight train upon and over the crossing in question and into the siding of the first sidetrack south of the main track of the railroad of the defendant company in the village of Leiter's Ford, Indiana, and thereafter unnecessarily and negligently permitted the same to stand over and upon said crossing at the time in question, and that at such time the defendant company negligently failed to cut said train at said crossing, or to leave for the traveling public any space whatever between the cars of said train at said crossing; that said train extended from said crossing westward about twenty-five or thirty rods to the engine of the same, and the east end of said train extended east from said crossing about fifty to seventy-five feet from the center of said crossing; that at the said time the decedent herein, Joseph Hunter, approached on foot from the south on said highway toward said crossing with the intention of passing over the same; and thereupon said freight train was obstructing said crossing as aforesaid, and said decedent on his approach and attempt to pass said crossing was prevented thereby from passing over said crossing; and thereupon said decedent started to pass around the east end of said freight train by going eastward along and about said freight train upon the right of way of this defendant intending to return to said highway, and using reasonable care and caution in so doing, the said decedent would not thereby as a matter of law become a trespasser, and if while doing so he was killed by reason of the negligence of the defendant in operating and managing another train over said

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crossing in manner and form alleged in the complaint, and without fault or negligence on the part of said decedent, then the defendant company would be liable therefor, *provided the other material allegations of the complaint are proven.*"

"12. * * * If you find from a preponderance of the evidence that the defendant, through its servants in charge of the train in question, backed the engine and train or part of the train, over said crossing in the night time and while it was dark, at a rapid and dangerous rate of speed, that the same was a much used crossing at said time of night, that said defendant had no light on the end of said train approaching said crossing, and gave no signals or warnings of any character of the approach of said train, and so backed said train upon and over said crossing and said decedent Hunter, and thereby killed him as alleged in the complaint, *then said defendant would be guilty of negligence in operating said train, and if you further find that said negligence was the cause of said injury and death of said Hunter, said defendant would be liable therefor, provided the other material allegations are established* and provided said Hunter was not guilty of negligence which contributed to his death." (Our italics.) The giving of each of these instructions is urged as error.

Instruction No. 6 is objected to on the ground that the statute quoted applies to a conductor and does not prescribe the duty of the railroad company in

3. reference thereto. This contention is answered

by the Supreme Court in the following cases:

Cleveland, etc., R. Co. v. Tauer (1911), 176 Ind. 621, 624, 96 N. E. 758, 39 L. R. A. (N. S.) 20; *McCollum v. Cleveland, etc., R. Co.* (1899), 154 Ind. 97, 55 N. E. 1024.

Instructions Nos. 7 and 9 are each objected to on the ground that the complaint charges two acts of negli-

gence, combined and acting in concert, viz., the

4. blocking of the crossing and the negligent running of the other train backward, and it is insisted that these instructions authorize recovery by proof of the one or the other of said acts alone. Assuming, without deciding, that appellant is right in its interpretation of the theory of the complaint, neither of the instructions is open to the objection urged. They respectively tell the jury, and correctly so, what facts will authorize it to find the appellant guilty of *negligence*, under the respective sections of statute before referred to, and then instruction No. 7 says in effect that *if the decedent was killed by such negligence* and the widow and children were damaged thereby, the appellant would be liable, "*provided all the other material allegations of the complaint are proven,*" and provided "further that you do not find from a preponderance of the evidence that said decedent was himself guilty of contributory negligence." Similar provisos appear in instruction No. 9. With such provisos in said instructions, the jury could not have been misled as to the facts essential to liability.

Instruction No. 9 is also objected to on the further ground that it is not applicable to the evidence. The same objection is urged to instruction No. 8.

5. These objections involve the law propositions referred to, *supra*, viz., such objections are based on the assumption that deceased was a trespasser, and that the statute requiring signals was intended for the benefit of those only who were in the street, either crossing or attempting to cross the tracks within the street limits. The same question is presented by appellant's objections to instructions Nos. 11 and 12, given by the court, and appellant's refused instruction No. 9 and others and, as before stated, is the controlling question presented by this appeal.

Chicago, etc., R. Co. v. Hunter, Admx.—65 Ind. App. 158.

While this exact question seems to have never been squarely decided in this state, this court has recognized the right of the traveler "to deviate from the established way on adjacent land when the highway becomes impassable." *Small v. Binford* (1907), 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19. Indeed this right seems to have been long recognized as fundamental. 1 Cooley, Blackstone (book 2 [4th ed.] 35) 460; 37 Cyc 206, and the cases there cited.

If an obstruction on the highway, for which the adjacent owner is in no way responsible, will authorize the use of his land adjacent to the highway by the traveler as a means of getting by the obstruction, it would seem that there should be no reason why one who, under the law, is guilty of purposely and intentionally obstructing a highway in violation of a positive statute should be permitted to treat as a trespasser another who, in the use of such highway, is compelled by such obstruction to pass over such adjacent owner's premises.

In addition to said fundamental principle, which is in appellee's favor, he also has express authority in other jurisdictions which support his contention. The Supreme Court of New York, Appellate Division, in a case where the facts involved were very similar to those here involved, held in effect that the traveler injured on the railroad company's right of way, adjacent to the street crossing, was not a trespasser, and that the railroad company owed to such injured traveler the duties which it owed to other travelers using the crossing in the usual and ordinary way. *Kurt v. Lake Shore, etc., R. Co.* (1908), 127 App. Div. 838, 111 N. Y. Supp. 859. This case was affirmed by the Court of Appeals in 194 N. Y. 583, 88 N. E. 1122. See, also, *Crowley v. Pennsylvania R. Co.* (1911), 231 Pa. 286, 80 Atl. 75; *Savannah, etc., R. Co. v. Hatcher* (1902),

115 Ga. 379, 41 S. E. 606; *Mayer v. Chicago, etc., R. Co.* (1896), 63 Ill. App. 309; *Chicago, etc., R. Co. v. Mayer* (1904), 112 Ill. App. 149; *Johnson v. Atlantic, etc., R. Co.* (1910), 59 Fla. 302, 51 South. 851, 138 Am. St. 126, 20 Ann. Cas. 1003; *Central v. Owen* (1904), 121 Ga. 220, 48 S. E. 916. Appellant's contention in the Kurt case, first cited *supra*, was substantially the same as that here made by appellant, and, in that case, the appellant had in its favor a statute of the state of New York, the wording of which, if strictly construed, would have authorized the interpretation there insisted upon by the appellant.

We therefore hold that, as affecting the question under consideration, instructions Nos. 7, 9, 11 and 12, given by the trial court, were in accord with both reason and authority; and hence furnish appellant no ground for reversal. In this connection the court also gave instruction No. 10, which is as follows: "10. The statute just quoted you about sounding the whistle and ringing the bell on a locomotive engine while approaching a highway crossing is made for the protection of travelers on public highways in approaching a railroad, and does not apply when a person is upon the right of way of a railroad as a trespasser in any way. If you find that said decedent was not at the time of his said injury upon said highway, but was on the right of way of said defendant walking thereon, and without intention or purpose of returning to said highway, then so far as this case is concerned he would be a trespasser, and there would be no recovery." This instruction presented appellant's theory of the case as favorably to it as the authorities *supra* would warrant.

The court's refusal to give instruction No. 9, tendered by appellant, is urged as error. The latter part of this instruction told the jury in effect that

6. if there were three routes, either of which dece-

dent could have taken in passing around the obstructing train, and one of them was dangerous, and the other two were safe, if decedent took the dangerous way, he would in that event be guilty of contributing to his injury and could not recover.

Assuming, without so holding, that there was evidence to which the instruction was applicable, it was properly refused because it invaded the province of the jury, in that it told the jury, as a matter of law, that the taking of the dangerous route was negligence, when such question was one of fact for the jury to be determined from all the circumstances of the case. *Jenney Electric Mfg. Co. v. Flannery* (1912), 53 Ind. App. 397, 98 N. E. 424, and cases there cited.

Finally, it is contended by appellant that there was a material variance between the complaint and the proof

in that the complaint charges and proceeds on

7. the theory that the decedent was struck *while in the street*, attempting to cross appellant's tracks, while the proof shows that he was not in the street when struck, but was on appellant's right of way.

This is in effect a presentation in another form of the question already considered and determined. While there may be a technical variance between the averments of the complaint and the proof in the respect suggested, it is not of a material character under the authorities cited above. The theory of the complaint is that decedent was in the street on the crossing when injured, in the sense that appellant owed to him the care which it owed to travelers generally on its crossing, and that its failure to exercise such care resulted in decedent's death. Under the authorities before cited, this theory of the complaint was sustained by the evidence.

No reversible error appearing in the record, the judgment should be, and is, affirmed.

NOTE.—Reported in 113 N. E. 772. Railroads: (a) liability of railroad company toward one who goes upon its property to pass around a train blocking crossing, 5 L. R. A. (N. S.) 775, 20 Ann. Cas. 1094, 33 Cyc 932; (b) liability of company as affected by cars blocking crossing unlawfully, Ann. Cas. 1915B 642.

IN RE PETERS.

[No. 9,950. Filed June 28, 1917.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Dependency of Father on Minor Son.—Question of Fact.*—As §38 of the Workmen's Compensation Act, Acts 1915 p. 392, does not include the father of a minor son in any of the classes in which dependency is conclusively presumed, the question of his dependency on the earnings of the son, and the degree thereof, must be determined in accordance with the existing fact at the time of the injury. p. 177.
2. MASTER AND SERVANT.—*Workmen's Compensation Acts.—Dependency of Parent.*—Want or distress need not exist before a condition of dependency arises, and a parent or his family need not reduce their expense of living below a reasonable standard in order to escape dependency and thereby absolve an employer from the payment of compensation for which he would otherwise be liable. p. 177.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Dependent Parent.*—The word "dependent," as used in the Workmen's Compensation Act, Acts 1915 p. 392, should be given a meaning broad enough to include the reasonable needs of a parent in the proper support of himself and dependent family. p. 178.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Dependency of Father.—Evidence.*—Where weekly contributions from his wages made by a minor son to his father, who earned \$15 weekly, were used and required for the support of the family, consisting of the father, mother, and three minor children, and the father owned no property and had no income with which to maintain the family except his own wages and the contributions of the son, such facts are sufficient to warrant the Industrial Board in drawing the inference that the father was dependent on the son within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392. p. 178.
5. MASTER AND SERVANT.—*Workmen's Compensation Act.—Partial Dependency of Parent.*—Where a father, earning \$15

weekly, supported his family from a fund composed of his wages and those of a minor son, who earned \$12.75 a week, the father was only partially dependent on the son within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392. p. 179.

6. **MASTER AND SERVANT.—Workmen's Compensation Act.—Dependent Parent.—Amount of Compensation.—Cost of Maintenance of Contributing Child.**—Where a father supported his entire family out of a fund composed of the earnings of himself and a minor son, so that the father was a partial dependent, the cost of the maintenance of the contributing son should not be considered in determining the amount of compensation to which the dependent father is entitled under the Workmen's Compensation Act, Acts 1915 p. 392, for the son's death. p. 179.
7. **MASTER AND SERVANT.—Workmen's Compensation Act.—Partially Dependent Parent.—Amount of Compensation.**—Under §37 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that the compensation of a partial dependent shall be in the same proportion to the weekly compensation for persons wholly dependent as the amount contributed by the deceased employe to such partial dependent bears to his annual earnings at the time of his injury, where a father, partially dependent on a minor son, received all his son's earnings, there is no difference between the amounts of compensation that a total dependent and a partial dependent are entitled to receive under the act. p. 181.

From the Industrial Board of Indiana.

Certified questions of law.

Proceedings under the Workmen's Compensation Act in the matter of one Peters. Questions of law certified by the Industrial Board. *Questions answered.*

BATMAN, J.—Under the provisions of §61 of the Workmen's Compensation Act (Acts 1915 p. 392), the Industrial Board has certified to this court certain questions of law based upon the facts presented by a proceeding pending before that body, seeking the opinion of this court for guidance in determining such proceeding.

The statement of facts as submitted by the board is as follows: "A, a boy of 17 years of age, was in the

employment of B on and prior to the 16th day of February, 1916, at an average weekly wage of \$12.75; that on said date he received a personal injury by an accident arising out of and in the course of his employment, resulting in his instant death; that the employer had actual personal knowledge of the injury and death at the time of the occurrence; that the employe left surviving him a father, 41 years of age, a mother, 40 years of age, a brother, 15 years of age, and a brother, 8 years of age; that the deceased, the father, the mother, and the two brothers were living together as a family at the time of his injury and death; that the father was working and receiving a weekly wage of \$15.00; that the father owned no property and had no income with which to support the family except his own wages and the wages of the deceased; that the deceased had been working for two years prior to his death and during all of said time had turned his wages over to his father weekly; that the wages of the deceased and the wages of the father went into a family fund which were used for and were required for the support of the family; that out of said family fund the father supported the whole family, providing a home, clothes and food for the deceased at a probable weekly cost of four dollars."

The father makes claim for compensation and claims that he is entitled to full compensation, or fifty-five per cent. of \$12.75 for 300 weeks. First, the employer denies absolutely the dependency of the father; and second, that, if he is dependent, he is not entitled to full compensation.

Upon the foregoing facts the board submits the following questions: 1. Is the father of the deceased a dependent of the deceased son within the meaning of the Indiana Workmen's Compensation Act? 2. If the father be a dependent, is he entitled to full compensation, viz., fifty-five per cent. of \$12.75 for 300 weeks?

The questions presented for our determination in this case involve the dependency of a father on the earnings of a minor son for the support of himself and

1. his family, consisting of his wife and two minor children. The Workmen's Compensation Act now in force in this state makes certain provisions for dependents, but does not undertake to define dependency. Section 38 of the act, *supra*, specifies who shall be conclusively presumed to be wholly dependent for support upon a deceased employe, and then provides that: "In all other cases, questions of dependency, in whole or in part, shall be determined in accordance with the fact as the fact may be at the time of the injury." It will be found that the father of a minor son is not included in any of the classes in which dependency is conclusively presumed by the terms of the act. Therefore, the fact of his dependency on the earnings of the son and the degree thereof must be determined in accordance with the existing fact at the time of the injury.

The meaning of the word "dependent," when used in compensation and liability acts, has been frequently considered by various courts. The definitions

2. given and applications made have not always been uniform, and hence authorities may be found to support various ascribed meanings. However, it has been uniformly held that want or distress need not exist before it can be said that the condition of dependency arises, and that a parent or his family need not reduce their expense of living below a reasonable standard in order to escape dependency and thereby absolve an employer from the payment of compensation who would otherwise be liable for the payment thereof. *Dazy v. Apponaug Co.* (1914), 36 R. I. 81, 89 Atl. 160; *Matter of Rhyner v. Huber Bldg.*

Co. (1916), 171 App. Div. 56, 156 N. Y. Supp. 903; 1 Honnold, Workmen's Compensation §70; 2 Bradbury, Workmen's Compensation 315.

In harmony with the foregoing statement, and the authorities cited in support thereof, this court has recently said, in the case of *In re Carroll* (1917), *ante* 146, 116 N. E. 844: "To confine the inquiry to the question whether the family of the deceased workman could have supported life without any contributions from him, or whether such contributions were absolutely necessary in order that the family might be reasonably maintained, is not a fair test of dependency; but rather the inquiry should include the question whether contributions from the workman were looked to, depended and relied on, in whole or in part, by the family for means of reasonable support. *Howells v. Vivian & Sons* (1902), 85 L. T. 529; *Powers v. Hotel Bond Co.* (1915), 89 Conn. 143, 93 Atl. 245." Fol-

lowing the rule thus stated, it is clear that the
3. word "dependent" as used in the Indiana Workmen's Compensation Act should be given a meaning broad enough to include the reasonable needs of a parent in the proper support of himself and his dependent family. Such construction is in accord with the decisions in many well-considered cases in other jurisdictions where compensation laws are in force with similar provisions.

Whether an applicant in any given case is entitled to compensation as a dependent will necessarily be determined from conditions and circumstances dis-

4. closed by the evidence. In the facts submitted it is stated that the weekly contributions made by the minor son to his father from his wages were used and required for the support of his family. This fact, taken in connection with other facts stated, would warrant the Industrial Board in drawing the infer-

ence that such father was dependent on his deceased minor son within the meaning of the Indiana Workmen's Compensation Act.

The remaining question of law submitted relates to the amount of compensation to which the father is entitled by reason of the death of his minor son

5. under the facts stated. The act in question, by §§37 and 38, recognizes two classes of dependents, viz., those wholly dependent, and those partially dependent. Inasmuch as the facts submitted show that the father was working and receiving a weekly wage, at the time of the injury and death of his son, of \$15, which went into a family fund and was used for the support of his family, we conclude that such father was only partially dependent on the contributions made by the deceased son from his earnings. Section 37

of the act, *supra*, provides that the compensation

6. to be received by such partial dependent shall "be in the same proportion to the weekly compensation for persons wholly dependent as the amount contributed by the deceased employe to such partial dependent bears to his annual earnings at the time of the injury." The statement of facts shows that out of the family fund, composed of the earnings of both father and son, the father supported the whole family, providing a home, clothes and food for the deceased son, at a probable weekly cost of four dollars. The question then arises, Shall the cost of the maintenance of such deceased son be deducted from the earnings, contributed by him to his father for the support of his dependent family, in determining the amount of compensation to which such father is entitled as a partial dependent? A consideration of the purpose of the act and the authorities in other jurisdictions has led us to the conclusion that such deduction should not be made.

It is contended that a proper inquiry to be made,

where a parent makes application for compensation by reason of being deprived of contributions from the earnings of a minor son, is whether such son was a financial asset to such parent; that the mere fact that the son's earnings entered into the common family fund is not material, unless those earnings exceeded the cost of his maintenance. This contention finds support in certain cases under the English Workmen's Compensation Act, where it is provided that the compensation shall be "proportionate to the injury to the said dependents," but it has not met with approval in this country under acts similar to the one by which we are governed. This identical question was involved in the case of *Mahoney v. Gamble-Desmond Co.* (1916), 90 Conn. 255, 258, 96 Atl. 1025, 1026, L. R. A. 1916E 110, decided by the Supreme Court of Connecticut, in which the court said: "We are not, therefore, required in this case to strike a balance between the boy's earnings and the cost of his maintenance, with a view to ascertaining whether his death was a financial injury to the father. We are only to determine whether, at the time of the injury, the father was dependent upon the boy's earnings within the meaning of the Act. As to this we think there can be no doubt. It was the father's duty to support the boy, and it was his right to receive the boy's wages. The boy did not, as the respondent argues, give to his father his pay envelope in exchange for maintenance. Nor did the father maintain the boy in exchange for his wages. The boy's wages belonged to the father. Whatever earnings the boy turned over to his father were used by the father in discharging his legal obligation to support his family; and as the father had no other income at the time of the injury, he was plainly dependent on the boy's earnings for his means of living." The cases of *Gove's Case* (1916), 223 Mass. 187, 111 N. E. 702, and

Murphy's Case (1914), 218 Mass. 278, 105 N. E. 635, are to the same effect. It might be contended that it would be unjust to allow compensation to a dependent father, based on the earnings contributed by a minor son, where the father supports such son, without deducting the cost of such support. But in view of the fact that the act in question does not purport to provide a method of determining the actual loss sustained by such father, and to require full compensation for such loss, but only assumes to fix an arbitrary amount that shall be paid the father as compensation, based on the son's annual earnings and contributions therefrom to such dependent father, it is manifest that there is no basis for such contention. There is no provision in the act for any such deduction, and no language from which such requirement can be inferred. Hence we conclude, both on reason and authority, that the cost of the maintenance of a contributing minor son should not be considered in determining the amount of compensation to which a dependent father is entitled.

The only remaining question is as to the amount of compensation to which such father is entitled under the facts stated. Having determined that the
7. facts stated would justify the Industrial Board in concluding that such father is a partial dependent, and that a deduction of the cost of the son's support is not authorized, we need only apply the rule laid down in §37 of the act, *supra*, to determine the amount of the compensation. Under this rule such father should receive, for a period of 300 weeks, that proportion of what he would have received, had he been wholly dependent, as what he actually received from his deceased son bears to his son's annual earnings at the time of his death. As the father was receiving all his deceased son's earnings at the time of his death, or 100 per cent. thereof, it follows that he will be

entitled to receive 100 per cent. of what he would have received, had he been wholly dependent. In other words, there is no difference in the amounts that a total dependent and a partial dependent are entitled to receive under such section, where such partial dependent receives all the earnings of such injured employee. In this case the average weekly wage of the son at the time of his death was \$12.75, all of which he was contributing to his partially dependent father for the support of himself and his dependent family. It therefore follows that such father will be entitled to a weekly compensation of fifty-five per cent. of \$12.75 or \$7.01 $\frac{1}{4}$ for 300 weeks, the same as he would have been entitled to receive had he been wholly dependent. This conclusion not only follows from a reading of the statute, but is fully supported by the decision of the Supreme Judicial Court of Massachusetts under an act with substantially the same language in that regard. *In re Murphy's Case, supra.*

NOTE.—Reported in 116 N. E. 850. See note *ante* 158.

KINGAN AND COMPANY, LIMITED, v. BUFORD ET AL.

[No. 9,597. Filed June 28, 1917.]

MASTER AND SERVANT.—*Workmen's Compensation Act.*—Award.—*Right to Review.*—Under §60 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that an application for review may be made if the first hearing was not before the full board, the Industrial Board has no power to review an award where the first hearing was before the full board, and any award made on such review is a nullity.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Haughty Buford and another against Kingan and Company, Limited. From an award for applicants, the employer appeals. *Appeal dismissed.*

Burrell Wright, Solon J. Carter and D. P. Williams,
for appellant.

McDonald & White, for appellees.

IBACH, P. J.—On January 27, 1916, one Allison Buford, while in the employ of appellant, received an accidental injury which resulted in his death. The deceased left as surviving dependents his widow, Haughty Buford, and his step-son, Willie D. Reynolds, who are the appellees herein. A controversy arose as to appellant's liability under the Workmen's Compensation Act, Acts 1915 p. 392, and appellees filed their application with the Industrial Board for an award. On February 15, 1916, the application was heard before the full board. On February 26, 1916, the full board made a finding of facts and an award, granting appellees compensation at the rate of \$5.67 a week for 300 weeks, and ordering that appellant pay the burial expenses of deceased, amounting to \$86.30. On March 3, 1916, appellant filed with the board its application for a review under §60 of said act, which application appellees resisted. On March 10, 1916, the full board heard arguments of counsel for both parties on such application and reconsidered the evidence, took the matter under advisement and, on April 3, 1916, announced its opinion that it had no right to review, under §60, an award made by the full board but on the same day entered of record what purports to be a finding of facts and an award in the identical language of the original.

It will be observed from appellant's application and briefs that its claim to a review is based solely on said section and that it sought a review of the award made by the full board on February 26, 1916. No such right is granted by said section and, so far as the second award is concerned, made on April 3, 1916, although identical with that made on February 26, it is a mere

nullity. *Studebaker v. Alexander* (1912), 179 Ind. 189, 100 N. E. 10. The board itself and the fund involved are only creations of the legislature and it is clear, we think, that it was not the intention of the legislature to provide in the *act* for more than one hearing before the full board. *Union Sanitary Mfg. Co. v. Davis* (1916), 63 Ind. App. 548, 114 N. E. 872. Therefore the appeal should have been taken within thirty days from the date of the original award.

We are not called upon by this appeal to determine whether the board, upon proper application, has any inherent discretionary power to grant a review under any circumstances, so that we have limited our consideration solely to the question as it comes to us in the present appeal.

Appeal dismissed.

Hottel, C. J., Felt, Batman and Caldwell, JJ., concur.

CONCURRING OPINION.

DAUSMAN, J.—I concur in the result reached in this case; but my sense of propriety impels me to dissent from a portion of the majority opinion. The following statement therein is germane and essential to the decision: "The board itself and the fund involved are only creations of the legislature and it is clear, we think, that it was not the intention of the legislature to provide in the *act* for more than one hearing before the full board."

This statement is equivalent to saying that independently of the statute the board has no power to set aside a finding and an award where the hearing was held before the full board, and has no power thereupon to hold another hearing and make another award. This inference is inevitable, for it is impossible to hold the second award void—an absolute nullity—on any other

theory. If the board has power, from whatever source derived, to set aside a finding and an award and to conduct a rehearing, under the circumstances of this case, then the action of the board herein is not void, but merely erroneous. However erroneous it may be, if it is not void, it cannot be ignored, and either party would have the right to appeal therefrom.

With the statement above quoted I find no fault, except that "the fund involved" is rather obscure; but it is followed by this: "We are not called upon by this appeal to determine whether the board, upon proper application, has any inherent discretionary power to grant a review under any circumstances, so that we have limited our consideration solely to the question as it comes to us in the present appeal." Now it seems to me that the latter statement is wholly unnecessary; and furthermore that it is erroneous and in conflict with the former statement. It is equivalent to saying that we reserve the right to decide at some future time, *and without overruling this decision*, that the board has power independently of the statute to set aside a finding and an award where the hearing was held before the full board, and thereupon to conduct a rehearing and make a new finding and make or deny another award, upon proper application. I most respectfully submit that this string tied to the main proposition can have no other effect than to mar the opinion and to mislead those who practice before the board. The application in this case was proper enough and no one is finding any fault with it. Whether the board "has any inherent discretionary power to grant a review under any circumstances" is, in my judgment, necessarily involved in this case, and is in fact involved in the statement first above quoted. As I view it, we are brought face to face with the duty to decide it. Questions of this character, as well as all others, should be decided fully

and fairly, so that there may be no suggestion of evasion.

The precise question presented by the motion to dismiss is, Must the time allowed for taking an appeal be reckoned from the date of the original award? The answer to this question depends on whether the Industrial Board had power to review, under said §60, an award made by the full board; for if it had not that power the pretended review is a nullity. In determining the question the fact must be kept clearly in mind that the Industrial Board is not a court. In the ordinary legal sense of the words, it has no judicial power. The rules of civil procedure, whether ordained in the Code or established by the courts, are not applicable to proceedings before the board. It is an administrative body created for the special purpose of administering the Workmen's Compensation Act, and belongs to the executive department of the state government. Of course, the administration of said act by the board involves the exercise of quasi-judicial power, but such power is merely incidental to its administrative function. It possesses only those powers which have been conferred upon it by the legislature; and its powers, as prescribed by statute, cannot be enlarged even by the consent of petitioner and respondent. *Deibeikis v. Link-Belt Co.* (1914), 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A 241; *Hunter v. Colfax, etc., Coal Co.* (1915), (Iowa), 154 N. W. 1037; *Mackin v. Detroit-Timkin Axle Co.* (1915), 187 Mich. 81, 153 N. W. 49; *State, ex rel. v. District Court* (1915), 128 Minn. 221, 150 N. W. 623; *Middleton v. Texas Power, etc., Co.* (1916), 108 Tex. 96, 185 S. W. 556; *State v. Mountain Timber Co.* (1913), 75 Wash. 581, 135 Pac. 645; *Borgnis v. Falk Co.* (1911), 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; *Flournoy v. City of Jeffersonville* (1861), 17 Ind. 169, 79 Am. Dec. 468; *State v. Board, etc.* (1874), 45 Ind.

501; *Waldo v. Wallace* (1859), 12 Ind. 569, 583; *Shoultz v. McPheeters* (1881), 79 Ind. 373; *Little v. State* (1883), 90 Ind. 338, 46 Am. Rep. 224; *Pressly v. Lamb* (1886), 105 Ind. 171, 4 N. E. 682; *Vandercook v. Williams* (1885), 106 Ind. 345, 1 N. E. 619, 8 N. E. 113; *State v. Noble* (1889), 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. 143; *State v. Denny* (1889), 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *State v. Hyde* (1889), 121 Ind. 20, 22 N. E. 644; *Board v. Stout* (1893), 136 Ind. 53, 35 N. E. 683; *Miller v. State* (1897), 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; *Betts v. New Hartford* (1856), 25 Conn. 180; *Foot v. Stiles* (1874), 57 N. Y. 399; *In re Saline County, etc.* (1869), 45 Mo. 52, 100 Am. Dec. 337; *Gilbert v. Board, etc.* (1895), 11 Utah 378, 40 Pac. 264; *Territory v. Cox* (1889), 6 Dak. 501; *George v. People* (1897), 167 Ill. 447, 47 N. E. 741; *State v. LeClair* (1894), 86 Me. 522, 30 Atl. 7.

We have emphasized the fact that the Industrial Board is not a court because it is apparent that counsel for appellant[†] labored under the mistaken belief that the board is a court and that the rules of civil procedure must be followed in matters before it; and because it is important that the board should not be hampered by the rules of court procedure. In the administration of the Workmen's Compensation Act, with its multiplicity of details, the board possesses a freedom of action not enjoyed by the courts. As said by the Supreme Court of Wisconsin: "The proceedings before such boards are not expected to be as formal and cumbrous as the proceedings of courts; indeed, the greater flexibility which such bodies must possess if they are to discharge their duties seems to demand greater freedom of action." But in no event must the board exceed its powers.

While keeping in mind that the Industrial Board is

not a court, nevertheless it is well to observe, for the sake of the principle, that the acts of even the courts done in excess of their power are void. It is a familiar rule that a court of special and limited jurisdiction has no power to review, retry, annul or set aside its judgment unless the power so to do is conferred by statute. *Brown v. Goble* (1884), 97 Ind. 86; *Leary v. Dyson* (1884), 98 Ind. 317; *Doctor v. Hartman* (1881), 74 Ind. 221; *Weir v. State* (1884), 96 Ind. 311; *Badger v. Merry* (1894), 139 Ind. 631, 39 N. E. 309; *Town of Hardinsburg v. Cravens* (1896), 148 Ind. 1, 47 N. E. 153. With stronger reason, therefore, an administrative board can have no power of review except as that power is conferred by the statute itself.

Whether the statute authorized a review where the first hearing was held before, and the award made by, the full board, depends upon the proper construction of §60 of said act—as said section existed at the time this proceeding was before the board. The purpose of the review under said section is to bring to bear upon the controversy the combined intellectual powers of all the members of the board, where the original hearing was held before a less number than the full board. In other words, the purpose is to give to any interested person the benefit of the judgment of *all* the members on the theory that two heads are better than one, and three better than two. So that the reason for a review under said section fails where the original hearing was held before the full board. The legislative intent would be expressed perhaps with greater certainty if said section read as follows: Section 60.—If the first hearing was not held before the full board, an application for review may be made to the board within seven days from the date of the award, which application shall be granted; and thereupon the full board shall review the evidence, or, if deemed advisable, shall hear

Bloomington, etc., Stone Co. v. Phillips—65 Ind. App. 189.

the parties at issue, their representatives and witnesses, as soon as practicable, and shall make an award which shall be filed in like manner as specified in the foregoing section.

The legislative intent, as expressed in §61, is that an award made by the full board "shall be conclusive and binding as to all questions of fact" unless an appeal be duly taken therefrom.

I agree with my brothers of this court that the board had no power to grant the application for a review or to hold a rehearing or to make a new finding and award; that the pretended review is a nullity; and that since no appeal was perfected within thirty days from and after the date of the original award, this attempted appeal cannot be entertained. I deeply regret the situation in which I am placed, but my conception of duty to myself and my position prompts me to place on file this separate opinion.

NOTE.—Reported in 116 N. E. 754. Workmen's compensation: appeal from award, L. R. A. 1916A 178, 266. See also note *ante* 158.

BLOOMINGTON-BEDFORD STONE COMPANY v.
PHILLIPS.

[No. 9,909. Filed June 29, 1917.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Findings by Industrial Board.—Conclusiveness.*—The determination by the Industrial Board of questions of fact is conclusive on appeal, if there is any evidence to support the findings of the board. p. 192.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Partial Dependency of Parent.—Determination.*—A divorced mother maintaining herself, her minor son and three other dependent minor children from a common fund composed of the earnings of the son and her own income, does not come within the class where dependency upon a deceased employe is conclusively presumed under §38 of the Workmen's Compensation Act, Acts 1915 p. 392, and her dependency must be determined in accordance with the facts at the time of the injury. p. 193.

3. **MASTER AND SERVANT.—*Workmen's Compensation Act.—Dependency.—Determination.***—The fact that a claimant for compensation could have supported life without contributions from a deceased employe, or that such contributions were absolutely necessary to the reasonable support of the claimant is not controlling in determining the question of dependency within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392, but the inquiry should be directed to ascertaining whether contributions from deceased had been looked to, depended and relied on, in whole or in part, by the claimant for means of reasonable support. p. 193.
4. **MASTER AND SERVANT.—*Workmen's Compensation Act.—Total Dependency.***—"Total dependency" upon a deceased employe, within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392, exists where the dependent subsists entirely on the earnings of decedent, but claimants are not deprived of the rights of total dependents, when otherwise entitled thereto, on account of temporary gratuitous services rendered them by others, occasional financial assistance received from other sources, or other minor considerations or benefits. p. 194.
5. **MASTER AND SERVANT.—*Workmen's Compensation Act.—Partial Dependency.***—Where a divorced mother maintained herself, her minor son, and three dependent minor children from a common fund composed of the wages of the son and her own income, the husband having been ordered, as part of the judgment in the divorce case, to pay the wife \$12 per month, but had paid only \$18 in a period of seven months, the mother was partially dependent on the minor son within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392. p. 194.
6. **MASTER AND SERVANT.—*Workmen's Compensation Act.—Partial Dependent.—Measure of Compensation.***—Under §37 of the Workmen's Compensation Act, Acts 1915 p. 392, prescribing the amount of compensation to one partially dependent upon a deceased employe, where a mother is a partial dependent on a minor child and receives all his wages, she is entitled to the same compensation as if she had been totally dependent. p. 194.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Dora Phillips against the Bloomington-Bedford Stone Company. From an award for applicant, the defendant appeals. *Affirmed.*

Jess B. Fields, for appellant.

Thomas J. Sare, for appellee.

Bloomington, etc., Stone Co. v. Phillips—65 Ind. App. 189.

FELT, J.—The appellee presented to the Industrial Board of Indiana her application for the allowance against appellant of her claim as a dependent of her deceased son, Claude Phillips. On the hearing before one member of the board appellee was allowed \$5.77 for 300 weeks and \$100 burial expenses. On review by the full board, after reviewing the evidence and hearing the argument of counsel, the board found the facts to be: "That on the 9th day of August, 1916, one Claude Phillips was in the employment of the defendant at an average weekly wage of \$12.00; that on said date he received a personal injury by an accident arising out of and in the course of his employment, resulting in his death on said date; that the defendant had knowledge of the accident and injury resulting in the death of said Claude Phillips at the time of the occurrence; that the said Claude Phillips was seventeen years of age at the time of his death and was living with the plaintiff, his mother, who was at said time a widow; that on March 18, 1916, by a judgment of the circuit court of Monroe county, Indiana, the plaintiff was granted a divorce from her husband by which she was given the custody of said Claude Phillips, and three other minor children then of the ages of fifteen, twelve and eight years respectively; that said judgment in said respect was in full force and effect on the 9th day of August, 1916; that the said Claude Phillips turned over and delivered to the plaintiff all of his earnings, which were placed into a common fund with the earnings and income of his mother; that the earnings and income of the mother and the earnings and income from the labor of the said Claude Phillips were all used by his mother and were required and were necessary for her to support herself and the said Claude Phillips and three other minor dependent children of the ages of fifteen, twelve and eight years; that the

child twelve years of age was at the said time a helpless cripple; that from the common fund made up of the wages of the said Claude Phillips and the earnings and the income of the plaintiff, the plaintiff furnished to the said Claude Phillips his home and board and money with which to purchase his clothing and other necessary incidentals and occasional sums for spending money, suitable to his station in life; that, as a part of the judgment, in the divorce case of the plaintiff against her husband, rendered on the 18th day of March, 1916, said husband was ordered to pay to the plaintiff for the support of the said Claude and three other minor children, twelve dollars per month; that from March 18, 1916, until October 1, 1916, the said husband paid to the plaintiff under said order only eighteen dollars; that in October, 1916, said order was so modified as to reduce the amount to be so paid by said husband to the plaintiff to six dollars per month."

The assignment of errors is criticized by appellee and it is said that no question of law is duly presented, but only one of fact as to the sufficiency of the evidence which is in the exclusive province of the Industrial Board. Appellant states that "The only question intended to be presented * * * is that of the dependency of the mother on the minor son." It is contended that the evidence does not warrant the ultimate facts found by the board, and that the facts found do not warrant the conclusion that appellee was wholly dependent on the deceased within the meaning of the statute. We shall treat the assignment as sufficient to warrant consideration of the two questions suggested by the foregoing statement.

Questions of fact determined by the Industrial Board are conclusive on appeal, where there is any evidence to support the findings of the board. We have ex-

1. amined the evidence in this case and cannot say

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as a matter of law that any of the material facts found by the board are unsupported by the evidence.

The general subject of dependency under the Workmen's Compensation Act has recently been considered by this court in the case of *In re Carroll* (1917),

2. *ante* 146, 116 N. E. 844. Following this decision it is apparent that the case at bar falls within the class where dependency is not conclusively presumed and comes under that portion of §38 of the Workmen's Compensation Act (Acts 1915 p. 392) which states that: "In all other cases, questions of dependency in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury."

In the case above referred to this court states in substance that the question of dependency does not turn upon the proposition that the claimant

3. could have supported life without contributions from the deceased, or that such contributions were absolutely necessary to the reasonable support of the claimant; but rather the inquiry should be directed to ascertaining whether contributions from the deceased had been looked to, depended and relied on, in whole or in part, by the claimant for means of reasonable support. As supporting this proposition, see also *Murphy's Case* (1914), 218 Mass. 278, 105 N. E. 635; *Howells v. Vivian & Sons* (1902), 85 L. T. 529; *Gove's Case* (1916), 223 Mass. 187, 111 N. E. 702; *Powers v. Hotel Bond Co.* (1915), 89 Conn. 143, 93 Atl. 245, 249; *Havey v. Erie R. Co.* (1915), 87 N. J. Law 444, 95 Atl. 124, 125; *Mahoney v. Gamble-Desmond Co.* (1916), 90 Conn. 255, 96 Atl. 1025, L. R. A. 1916E 110.

Total dependency exists where the dependent subsists entirely on the earnings of the workmen. But

in applying this rule courts have not deprived

4. claimants of the rights of total dependents, when otherwise entitled thereto, on account of temporary gratuitous services rendered them by others, or on account of occasional financial assistance received from other sources, or on account of other minor considerations or benefits which do not substantially modify or change the general rule as above stated. 1 *Honnold, Workmen's Compensation* §72 and notes. *Buckley's Case* (1914), 218 Mass. 354, 105 N. E. 979, Ann. Cas. 1916B 474 and notes 480; *State, ex rel. v. District Court* (1915), 128 Minn. 338, 151 N. W. 123; *Carter's Case* (1915), 221 Mass. 105, 108 N. E. 911; *Caliendo's Case* (1914), 219 Mass. 498, 107 N. E. 370; *Kennerson v. Thames Towboat Co.* (1915), 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A 436.

Applying this rule to the case at bar, we cannot say that appellee was totally dependent on her deceased son,

within the meaning of the Workmen's Compensation Act, but on the facts found by the board we hold as a matter of law that she was partially dependent on him for support and that the amount of her award should be determined by the rule as laid down in §37 of the act aforesaid, as interpreted by this court in the case of *In re Peters* (1917), ante 174, 116 N. E. 848. By the conclusion of the full board appellee is "awarded against the defendant 300 weeks' compensation at the rate of \$6.60 per week."

The award does not state how the amount was determined. If the board intended to find that appellee was totally dependent, the amount would be correct

6. on that theory for it is fifty-five per cent. of the average weekly wage of the deceased as found by the Industrial Board. On the other hand, if the board intended to find that appellee was only partially dependent, in view of its finding as an ultimate fact

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that the deceased turned all his wages over to his mother, the result would be the same in this instance, for the reason that the amount contributed is 100 per cent. of the average weekly wage of the deceased. This result follows from the rule laid down in §37 of the act aforesaid. *In re Peters, supra.*

The board having reached a correct result on the facts found, the award should be and is hereby affirmed.

NOTE.—Reported in 116 N. E. 850. See note *ante* 158.

WELLIVER, RECEIVER, v. COATE ET AL.

[No. 9,005. Filed January 11, 1917. Rehearing denied April 27, 1917. Transfer denied June 29, 1917.]

1. INSURANCE.—*Fire Insurance.—Organization of Company.—Right to do Business.—Statute.*—Section 4651 Burns 1914, Acts 1889 p. 346, providing that a fire insurance company is authorized to issue policies where it has applications for insurance in which there shall be taken not less than \$100,000 in *bona fide* premium notes and \$20,000 in cash by the company, contemplates that the latter sum shall be paid on applications for insurance and not advanced by the incorporators or any of them, under an arrangement whereby it was to be returned to them when the financial condition of the company permitted. p. 209.
2. STATUTES.—*Executive Construction.—Force and Effect.*—The opinion of the auditor of state interpreting a statute which he is charged to enforce, or the opinion of the Attorney-General in construing such statute, is not binding on the courts, but the fact that such opinions were obtained is entitled to weight in determining the *bona fides* of action based thereon. p. 210.
3. CORPORATIONS.—*Powers.—Right to Borrow Money.*—In the absence of a prohibitory provision in its charter or in its enabling and governing act, it is neither illegal nor *ultra vires* for a corporation to borrow money to carry out the purposes for which it was organized. p. 213.
4. INSURANCE.—*Fire Insurance Company.—Payment of Borrowed Money.—Recovery by Receiver.—Ultra Vires Acts.*—Where in a good-faith attempt to comply with §4651 Burns 1914, Acts 1889 p. 346, providing that a fire insurance company may issue policies when it has applications for insurance in

which there shall be taken not less than \$100,000 in *bona fide* premium notes and \$20,000 in cash, the statute contemplating that the latter sum be paid by applicants for insurance, the promoters and incorporators of an insurance company, misinterpreting the statute, advanced the \$20,000, and the corporation received and used such sum for the legitimate purposes of the business, and later such incorporators, as directors of the company, in good faith and acting for the corporation paid back a portion of the money, the financial condition of the company being such at the time as to justify the belief that such payments could be made without impairing the corporation's liability to pay all losses that could reasonably be anticipated, the receiver of the company could not in its behalf recover the money so paid on the ground that the transaction was not within the powers of the corporation. p. 214.

5. CORPORATIONS.—*Debts.—Money Borrowed from Officers.—Liability.*—Where money is advanced to a corporation by its managing officers or directors, the transaction will be closely scrutinized to determine whether it was fair and just, and the conduct of the officers free from fraud, and such transactions, when not duly authorized, are usually regarded as voidable at the election of the corporation. p. 216.
6. INSURANCE.—*Insurance Company.—Debts.—Money Borrowed from Officers.—Payment.—Right of Receiver to Recover.*—Where the promoters and incorporators of a fire insurance company advanced it money, in an attempt to comply with certain statutory requirements relating to the organization of such concerns, on the condition that they were to be repaid when the financial condition of the company permitted, and the money was used for the legitimate purposes of the business, the receiver of the corporation, suing in its behalf, could not recover money later paid on the loan by such promoters acting as directors of the company on the ground that the persons receiving such payments were officers of the corporation, the transaction being fair, just and free from fraud. p. 217.
7. INSURANCE.—*Insurance Company.—Debts.—Money Borrowed from Officers.—Payment.—Action by Receiver to Recover.—Policy-Holders.—Estoppel.*—Where the promoters and incorporators of a fire insurance company advanced money to it in an attempt to comply with certain statutory requirements relating to the organization of such concerns, and later as directors of the company in good faith and in behalf of the corporation paid back a portion of the money in accordance with the agreement made when the loan was negotiated, the entire transaction being fair and free from fraud, the receiver of the company could not, in behalf of the policy-holders who were fully in-

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- formed before taking out their policies as to the arrangement whereby the money was advanced and the conditions as to its repayment, recover the money repaid, as such policy-holders were estopped by their knowledge of the facts. pp. 217, 218.
8. RECEIVERS.—*Corporations.—Fraud.—Powers of Receiver.*—A receiver, in his capacity as representative of the general creditors, may avoid transactions had by the corporation in fraud of their rights. p. 217.
9. RECEIVERS.—*Corporations.—Fraud upon General Creditors.*—Where claims are based on transactions had by a corporation, and which are binding on it, but are fraudulently prejudicial to the general creditors, the receiver as representative of the creditors holds adversely to the corporation. p. 217.
10. INSURANCE.—*Receiver.—Insurance Corporation.—Classes of Creditors.—Right of Action by Receiver.*—Where the majority of the policy-holders of an insolvent insurance company were estopped by their knowledge of the transaction to recover money paid to the directors of the corporation in repayment of certain money advanced by them in an attempt to comply with statutory requirements relating to the organization of mutual fire insurance companies, the receiver of the corporation could not recover such repayments in behalf of policy-holders who did not receive notice of the transaction, since a receiver, as trustee for the creditors, may prosecute only those causes of which all the general creditors are beneficiaries, and interests peculiar to a class of creditors, from the benefits of which the general creditors are excluded, are not represented by a general receiver for purposes of vindicating rights based thereon by litigation. p. 219.

From Marion Circuit Court (21,606); *Charles Remster*, Judge.

Action by Charles B. Welliver, receiver of the Indiana State Fire Insurance Company, against Alvin T. Coate and others. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Miller & Dowling, for appellant.

William L. Taylor, Wilson S. Doan, James C. Matthews, Charles W. Smith, Henry H. Hornbrook and Albert P. Smith, for appellees.

CALDWELL, J.—Appellant, as receiver of the Indiana State Fire Insurance Company, brought this action

against appellees, Alvin T. Coate, John H. Furnas, Russel T. Byers and Joseph L. Ebner, to recover \$18,717.23, as money belonging to the insurance company, and alleged to have been wrongfully expended by appellees as officers and directors. A trial by the court resulted in a judgment that appellant take nothing and that appellees recover costs. The substantial questions arise on exceptions reserved to conclusions of law stated on a special finding. The correctness of the finding is not challenged.

While the finding covers seventy-five pages of the record, its material part is substantially as follows: Prior to October 16, 1906, appellees with others were contemplating the organization of a Mutual Fire Insurance Company, under the act of 1852 and acts amendatory and supplemental thereto. §§4601, 4647 *et seq.* Burns 1908, §§3708, 3745 R. S. 1881. Appellee Byers, being an attorney, thereupon drafted proposed articles of association to be used in the organization of the company. Article 6 as proposed by Byers was as follows:

"This corporation shall not issue policies of insurance or otherwise obligate itself upon any policy of insurance, until applications therefor approved by the board of directors shall have been made, in which there shall be taken not less than \$100,000 in bona fide premium notes, and \$20,000 in cash premiums."

Article 6 was based upon §4651 Burns 1914, Acts 1889 p. 346, which is in part as follows: "When application for insurance in which there shall be taken not less than a hundred thousand dollars, in *bona fide* premium notes and \$20,000 in cash by any such company, and of which it shall be at the time possessed, and proof of the same is furnished to the auditor of state, the books containing the same verified by the secretary of the company, and examined and approved by him, as evi-

denced by his certificate, such company may issue policies of insurance and renewals, on the same, for a term not exceeding seven years, against loss or damage by fire," etc. Byers being inexperienced in the organization of insurance companies, submitted his draft of the articles of association to Coate, who was experienced in such matters, whereupon the latter stated respecting article 6 that it was difficult if not impossible to procure applicants for insurance to make cash payments on premiums prior to the organization of the company, and that the practice had been for certain of the promoters to advance the requisite cash, in order that a license might issue, the money so advanced to be the property of the company for all legitimate purposes, but to be refunded as the financial condition of the company safely permitted. Byers thereupon submitted the articles as prepared by him to the deputy auditor of state, in charge of the insurance department, who in substance confirmed Coate's statements. Byers, however, called the deputy auditor's attention to the language of §4651, *supra*, and stated to him that he was not clear whether the suggested plan was in harmony with its terms, whereupon the deputy auditor stated that he would take the opinion of the Attorney-General on the subject. Subsequently at a meeting of the proposed organizers of the company, attended by and participated in by appellees, Byers presented his draft of articles and submitted the foregoing information, and suggested that if the opinion of the Attorney-General concurred with that of the deputy auditor, the proposed plan should be followed, otherwise that §6 should be complied with. Thereafter, October 27, 1906, the Attorney-General gave to the auditor of state, in response to a request to that end, his opinion in writing, to the effect that the statute, *supra*, required that such a company be possessed of the \$20,000 mentioned, not

as evidence of the *bona fides* of the enterprise or the good faith of those who had applied for insurance, "but only as evidence of the present financial responsibility of the organization"; that the statute did not require that such money be paid by those who had executed premium notes, but if possessed in good faith by the company, its source was not material, and that "in view of the fact that the main, if not the sole purpose of the requirement of \$20,000 in cash, is to secure immediately available security for policy-holders, and considering that the proof of good faith on the part of the promoters and of the substantial character of the proposed business is adequately supplied by the possession of *bona fide* premium notes aggregating \$100,000, I am of the opinion that the officers of a mutual fire insurance company, after securing the latter amount in premium notes, may themselves pay to the company \$20,000 in cash, though none of it is received from those who execute premium notes." The proposed organizers of the company, including appellees, believing that the opinion of the Attorney-General was a fair interpretation of the statute, *supra*, appellees thereupon agreed that they would advance such sum of \$20,000, and that it should be the property of said corporation when organized, and be used by it for all legitimate purposes of said corporation, to be repaid from time to time as in the opinion of the executive committee of said corporation, when the same should be organized, its financial condition would safely permit, and that such agreement should be made a part of the records of such corporation after its organization. Thereafter, May 13, 1907, appellees executed to the American National Bank of Indianapolis their sixty-day five per cent. note for \$20,000, the proceeds of which in said sum were at the request of said Indiana State Fire Insurance Company, deposited to its credit and subject to its check. On the

same day, appellee Coate having been elected secretary of the company, as such filed in the office of the auditor of state his written affirmation that pursuant to notice duly given, the company had received applications for insurance on which it had taken *bona fide* premium notes aggregating \$103,165.90 and that it had on deposit in said bank \$20,000. The next day appellees Ebner, Byers and Coate, president, attorney and secretary of the company respectively, filed with the auditor of state their affidavit in support of such affirmation and to the effect, among other things, that they constituted a majority of the board of directors of the company, that they believed the facts stated in such affirmation to be true, and that on the delivery of the policies mentioned therein there would be paid on said premium notes the sum of \$20,606. Annexed to the affidavit and verified by it was a schedule containing the names of 304 persons who had applied for insurance aggregating \$885,000. On May 15, 1907, appellees presented to the auditor of state articles of association for the incorporation of the company, prepared under the act of June 17, 1852, and acts amendatory and supplemental thereto (§§4601 and 4647 *et seq.* Burns 1908), and duly signed and acknowledged. Thereupon the auditor of state with knowledge of the facts and of the arrangement under which said sum of \$20,000 had been advanced by appellees and procured by the company, licensed the company to issue policies and certified its articles of association to the secretary of state. The company during its existence issued policies on the mutual plan, the members executing premium notes payable in installments as the board of directors might assess, and the liability of members being limited to the cash premiums and premium notes. Until August, 1909, it also issued policies on the stock plan. Each appellee was an incorporator of the com-

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pany, and at all times a member of the board of directors, except Ebner who ceased to be a director January 11, 1910. The by-laws provided for the selection of an executive committee of three by the board of directors from their own number. Coate was a member of the executive committee after October, 1907, and secretary of the company at all times. Byers was at all times a member of the executive committee and attorney for the company until November 17, 1910. Ebner was president until January 11, 1910, and Furnas was treasurer until January 12, 1910. The sum of \$20,000, procured and deposited as aforesaid, became the absolute property of the company on its organization, to be used by it for all legitimate purposes. Said sum, however, was to be repaid to appellees by the company in accordance with the agreement aforesaid, when in the opinion of the executive committee it could be safely done without impairing the financial condition of the company. At the time of executing said note and each renewal thereof for the balance after payments made, the makers thereof intended that the several notes should be, and the same were, their personal obligations, and the company was in nowise liable for the payment thereof. On October 5, 1907, at the first formal meeting of the board of directors, the members of which were appellees and one Fredericks, the board by unanimous vote adopted a resolution approving the action of appellees in negotiating said loan for the benefit of the company in accordance with the agreement aforesaid, and resolving that such sum should be repaid when in the opinion of the executive committee the funds of the company would justify. At a subsequent meeting of the board, of which Coate, Byers and Furnas constituted a majority, held May 19, 1910, the board by unanimous vote adopted, and ordered spread of record, a resolution to the effect that the said notes

executed by appellees represented their individual indebtedness and created no liability against the company, but that it was the original intent of the resolution of October 5, 1907, that as the funds of the company justified, the amount so placed to the credit of the company by appellees, with such interest as might accrue, should be returned to them. The court specifically finds that the facts embodied in the resolution of May 19, 1910, were true. Said sum of \$20,000, deposited as aforesaid, was carried on the ledger of the company in an account designated as the "guarantee fund account." The board of directors, on the advice of the executive committee, made payments to the bank out of the assets of the company, which payments were credited by the bank on said note and its renewals as follows: December 26, 1907, \$5,000; July 15, 1908, \$5,000; September 15, 1908, \$5,000; May 19, 1909, \$2,500. Also interest amounting to \$1,217.73. On such payments being made, a credit was entered on the books of the company to the effect that that amount of the guarantee fund had been returned. When the company made each of the payments, appellees executed to the bank a substituted renewal note for the unpaid balance. The last renewal, however, given May 19, 1909, for \$2,500, was executed only by Coate, Furnas and Byers. When each of such payments, principal and interest, was made, Coate, Ebner and Byers constituted the executive committee and also a majority of the board of directors. The executive committee and the board of directors and appellees in good faith believed at the time that such payments could be safely made without impairing the ability of the insurance company to pay all losses that might reasonably be anticipated. Appellees at all times intended that said note and the renewals thereof should be and the same were the personal obligations of appellees, and not the

liabilities of the company. Certain specific financial reports to the company, the policy-holders, and the board of directors were made by appellees and at their instance as officers and directors. The earliest of these reports was made January 28, 1908, and the last one January 11, 1910. The respective reports are set out either specifically or substantially in the finding. The sum of \$20,000, advanced by appellees, appears in each of these reports in the sense that it augments the assets. Its source, however, is not revealed. The reports disclose the payments made on said note and its renewals being designated in each case as made "for refund of guaranty deposit." The report dated January 11, 1910, was made to the company by Coate as secretary, and approved by the other appellees as directors. A printed copy was mailed on or about said day to each member and policy-holder. This report contained an explanation of the origin of the fund of \$20,000, and a statement to the effect that the company was entitled to return such fund in such installments and at such times as its finances would reasonably permit, and that the company had returned \$17,500 of such fund. The company made and filed with the auditor of state three reports disclosing its assets and liabilities and its income and expenditures for the respective periods covered, dated respectively January 29, 1908, February 23, 1909, and April 7, 1910. The first two were verified by Coate and Ebner, the last by Coate and Furnas. The court finds each of such reports to have been a correct statement of the assets, liabilities, income and expenditures of the company for the period covered by it. These reports are included in full in the finding. They cover twenty-two pages of the transcript. In each of them also the fund of \$20,000 augments the assets, there being, however, no explanation of its origin. These reports set out the amounts

of the respective payments made on said note and its renewals, designated in the respective reports as follows: Return of the organization fund, \$5,000; payment guarantee fund, \$10,000; payment return guaranty fund \$2,500. Neither in the reports made to the auditor of state, nor in those made to the company and policy-holders, is the obligation to repay listed as a liability, except as set out in the report of January 11, 1910, as aforesaid. Before making and filing the first of the reports to the auditor of state above mentioned, Coate, as secretary of the company, consulted the deputy auditor of state in charge of the insurance department, as to whether under the facts surrounding the transaction as herein set out, the receipt and retention of said sum of \$20,000, designated on the books of the company as a guarantee fund, should be shown in the report as a liability of the company. The deputy auditor advised Coate that such obligation, under the circumstances, should not be listed as a liability. As above set out, 304 persons applied for insurance in the prospective company, and with their applications executed premium notes aggregating \$103,165.90, before license was issued by the auditor of state. Such applications and notes were procured by agents and canvassers employed for that purpose. The organizers of the company, including appellees, directed such agents and canvassers, in soliciting such applications and in taking premium notes, to explain fully to the persons solicited the facts respecting the advancing of the \$20,000, and the time when and the circumstances under which it was to be repaid. These instructions as a general rule were followed, and the facts respecting the advancing of said sum and the arrangement for its repayment were generally made known and explained to such applicants. In some particular instances, however, the instructions were not followed. Also, after

license was issued, canvassers in soliciting insurance in behalf of the company continued in a general way, except in some particular instances, to inform persons solicited both respecting the plan pursued in procuring said \$20,000, and the arrangement for its repayment as above set out. At no time prior to the appointment of the receiver, as hereinafter set out, had any policyholder objected to the conduct of appellees or the board of directors, in advancing or procuring said sum, in executing the notes and the renewals therefor, or in repaying such sum in part as above set out. Appellees, at all times prior to the appointment of the receiver, believed that their acts and conduct with reference to such transaction were consented to and approved by the members and policy-holders. Appellees at no time attempted to conceal the fact that said sum of \$20,000 was to be repaid as the financial condition of the company would permit, or that payments had been or were being made thereon. The company paid dividends to its policy-holders, from time to time, aggregating \$8,866.16, no part of which has been returned.

Appellees in advancing the \$20,000 did not contract for, nor expect to receive, and they have not received, any profit therefor other than as enjoyed proportionately by every other member of the company. All said sum was expended by the company for the benefit of all the members and policy-holders. The remaining sum of \$2,500 which has not been returned to appellees (by being paid to the bank or otherwise), has been paid to the bank by Coate, Furnas and Byers, who executed the renewal note therefor as above set out. Such sum has not been repaid to them, and on January 17, 1911, they filed with the receiver a waiver of any right to such repayment. The court includes in the finding certain statements of the assets and liabilities of the com-

pany on December 31, 1907, July 31, 1908, September 30, 1908, and May 31, 1909, respectively, being at the close of the respective months in which the payments aggregating \$17,500 for application on the note and its renewals held by the bank and executed by appellees were made. These statements indicate that at each of such times the company was apparently in sound financial condition. The court finds that the financial condition of the company immediately after making such payments was substantially the same as on the dates of such statements respectively. Early in 1910 serious dissension arose among the officers and directors. Each party sent communications to the policy-holders in advocacy of the merits of the controversy from its standpoint. As a result a large and unusual number of the members surrendered their policies, which were canceled, and the unearned premiums thereon returned in cash, aggregating about \$16,000, in a period of ninety days after April 1, 1910. Mutual policies were issued for periods of from one to five years. On November 17, 1910, the company was adjudged insolvent and appellant appointed receiver. At that time there were unpaid fire loss claims aggregating \$17,525.21. There were also miscellaneous liabilities other than claims based on premiums paid, but unearned, aggregating \$889.95. The total assets of the company, exclusive of the contingent liability of its members on premium notes given, amounted to \$6,736.84. In order that the fire losses and expenses of the receivership might be paid, the receiver, by order of court, levied and collected from all the assessable members an annual premium on the premium notes held by the company. From such source the receiver realized \$14,589.02, collected from 440 members. Five hundred of the policy-holders had previously prepaid their premiums for a year beyond November 17, 1910,

aggregating \$11,723.22. In levying such assessments, the receiver took account of such prepaid premiums and adjusted them by making proper credits on the involved assessments, leaving, however, a balance of prepaid premiums not restored to certain policy-holders. Drawing on the fund arising from the assets that came into his hands and the sum realized from such assessment, the receiver has paid all the liabilities of the company, except the cost of the receivership, the costs and expenses incident to the prosecution of this suit, and claims based on such unearned premiums not restored. He has in his hands an unexpended balance of \$4,916. The receiver has not repaid to the assessed members any part of the sums collected from them respectively through such assessment, and the balance remaining in his hands is not sufficient to that end. No part of the sum aggregating \$18,717.73, including interest, paid by the company on said note, and the renewals thereof, executed by appellees to the bank, has been repaid to the company or to the receiver.

On the facts so found, the court stated five conclusions of law to the effect that the law is with the appellees, and that appellant is not entitled to recover; that certain members and policy-holders are estopped from maintaining the action, and that certain members are so estopped by reason of their knowledge and acquiescence in the facts attending the advancing and use of said sum of \$20,000, and its repayment in part, and that as a consequence, the receiver is not entitled to maintain the action for their benefit, and not being entitled to recover for all the members and policy-holders, he cannot recover for the benefit of any of them; that appellees are entitled to recover costs. If the conclusions to the effect that by reason of the principle of estoppel operating against certain members and policy-holders the receiver is not entitled to maintain

this action are correctly stated on the finding, it follows that the general conclusions that the law is with appellees and that they are entitled to recover costs are correctly stated also. We proceed to consider the conclusions.

The promoters of the Indiana State Fire Insurance Company in considering its organization were confronted by a statute providing in substance that such a company might be authorized to issue policies of insurance against loss by fire, etc., "when applications for insurance in which there shall be taken not less than a hundred thousand dollars, in *bona fide* premium notes and \$20,000 in cash by any such company, and of which it shall be at the time possessed." §4651 Burns 1908, 1914, *supra*.

Appellant contends, and appellees apparently concede, that such statute contemplated that the \$20,000 mentioned should be paid on applications for in-

1. surance. In our judgment appellant correctly interprets the statute in this respect. The promoters and incorporators of the Indiana State Fire Insurance Company, among whom were included appellees, did not so proceed. Being uncertain as to the meaning of the statute in the respect under consideration and as to whether the advancing of the sum by the incorporators or a number of them would satisfy its terms, they applied to the state official charged with the duty of supervising insurance companies and their organization for information. By him they were advised in substance that the statute did not require that the sum mentioned should be paid on applications for insurance; that the essential element was the good-faith acquisition and possession of the sum, and its availability for the legitimate purposes of the company; that the statute would be satisfied if the incorporators or

any of them advanced the money under an arrangement by which it should be returned to them when the financial condition of the company would permit, keeping in view its obligation to its policy-holders; that the statute had received a practical interpretation to that effect in the organization and licensing of other companies. Application having been made to the Attorney-General of the state, he in a written opinion substantially concurred in the opinion of the auditor

2. of state. Of course, the opinion of the auditor of state interpreting a statute with the enforcement of which he is charged, or the opinion of the Attorney-General in construing such a statute, is not binding on the courts, but the fact of such opinions is entitled to weight in determining the *bona fides* of action based thereon. Appellees thereupon in the utmost good faith executed their note by which they procured \$20,000 and obligated themselves to pay the note when due. They delivered the sum to the company. The company accepted it with full knowledge of its source, and under an arrangement by which it was to be repaid when the finances of the company would safely permit. The company received the full benefit of the money, placing it in a fund subsequently drawn on to pay fire losses, expenses, dividends to its members, etc. Appellees in advancing the money were actuated by no improper or selfish motive; they neither contracted for nor expected to receive any advantage or benefit peculiar to themselves; they did not receive any such advantage or benefit. Risking the loss of the sum advanced, as subsequently they did lose a substantial part of it, they were actuated solely by a purpose and desire to advance the interests of the company. They made no effort to conceal the fact that they had advanced the money, and that conditionally it was to be repaid to them. but on the contrary took steps by which every

applicant for insurance and every member of the company on becoming such should be fully informed of the facts, and as a general rule such applicants and members were so informed.

From time to time the company in harmony with the original understanding discharged its conditional obligation in part by paying money to the bank for application on the note and its renewals, until \$17,500 of the principal and \$1,217.73 of the interest, or a total of \$18,717.73 had been paid. Facts are found to the effect that when each of the payments was made, the financial condition of the company was apparently such as to justify an honest belief that it could be safely done. This action is predicated on the fact of such payments. The receiver sues to recover back the amount paid, with interest.

It appears from the finding that the policy-holders and members of the insurance corporation are financially interested in this litigation, if at all, in their capacity as creditors based on the fact of the assessments paid and advanced by them. From the conclusions of law, it is apparent that the decision in favor of appellees was based on estoppel operating against certain policy-holders and members who claim to be creditors, by reason of assessments paid and advanced. It is appellant's contention, however, that the cause of action on which the receiver sued was that of the corporation, rather than that of the individual policy-holders, and hence that estoppel operating against certain of the latter did not defeat the action. Respecting the title of a receiver, and the basis of his right to bring and maintain actions, we quote the following from *Marion Trust Co. v. Blish* (1908), 170 Ind. 686, 691, 84 N. E. 814, 85 N. E. 344, 18 L. R. A. (N. S.) 347: "There can be no doubt of the proposition that it is the general rule that in the ordinary receivership which is extended

over the affairs of an insolvent corporation, the receiver can only sue in the right of the corporation, and that he is subject to all of the equities which would have been available against it. This rule is subject to the exception that the receiver so far represents the general creditors that he may avoid transactions in fraud of their rights. 'Since the appointment of a receiver *in limine* does not affect any questions of right involved in the action, and does not change any contract relations or rights of action existing between parties, it follows as a general rule that in ordinary actions brought by a receiver in his official capacity, to recover upon an obligation or demand due to the person or estate which has passed under the receiver's control, the defendant may avail himself of any matter of defense which he might have urged had the action been brought by the original party instead of by his receiver.' High, Receivers (3d ed.), §245. In a subsequent section of the same work the author says: "While the receiver of an insolvent corporation is thus treated as the representative of both creditors and shareholders, so far as any beneficial interest is concerned, yet, for the purpose of determining the nature and extent of his title, he is regarded as representing only the corporate body itself, and not its creditors or shareholders, being vested by law with the estate of the corporation, and deriving his own title under and through it. For purposes of litigation, therefore, he takes only the rights of the corporation, such as could be asserted in its own name, and upon that basis only can he litigate for the benefit of either shareholders or creditors, except when acts have been done in fraud of the rights of the latter, but which are valid as against the corporation itself, in which case he holds adversely to the corporation.' High, Receivers (3d ed.), §315."

Considering the cause of action as the corporation's,

and that appellant acquired from it his right to bring and maintain the action, we are confronted with the following situation: Appellees, actuated solely by a purpose to further the interests of the company, and with no hope or expectation of benefit to themselves, except such as they would enjoy in common with all the members, in perfect good faith advanced the money involved. The corporation at the time of receiving it, and in consideration of its advancement, through its board of directors, acting by unanimous vote, agreed to repay it when and as the financial condition of the company permitted. The corporation used the money for its own purposes, and kept its agreement to the extent of repaying \$17,500 and interest. From the beginning of the transaction to the end, appellees were not guilty of fraud, bad faith or neglect. This action is brought to recover the sum paid. The mere statement of the facts is apparently convincing that had no receiver been appointed, the corporation could not have maintained the action and consequently that the receiver, if suing in its right, cannot maintain it. There are other arguments and facts, however, that must be considered.

Thus it is urged that the entire transaction by which the corporation received money and in part returned it was illegal and *ultra vires*. The transaction by which the money was advanced to the company considered by itself was in effect a loan. It was a loan of money to the company to be used by it for legitimate purposes. It was so used. It was expended in the payment of fire losses, expenses and dividends declared in favor of members. In the absence of a prohibitory pro-

3. vision in its charter or in its enabling and governing act, it is neither illegal nor *ultra vires* for a corporation to borrow money to carry out the purposes for which it was organized. *Wright v. Hughes* (1889), 119 Ind. 324, 21 N. E. 907, 12 Am. St. 412.

Under the facts here, however, the advancing of

4. money cannot be considered as an independent transaction. It cannot be disassociated from the statutory requirement respecting the acquisition and possession of \$20,000 in cash as a condition to the right to issue policies. The statute then in force (§4651 Burns 1908) contemplated that that sum be advanced on applications for insurance, and that it be held and used for the proper purposes of the company. The advancing of a like sum by appellees was intended as a compliance with the statutory requirement. It was based on a misinterpretation of the statute. Appellees, however, as found by the court, proceeded in good faith. If, under such circumstances, the receipt of the money by the corporation with the conditional agreement to repay it and its subsequent repayment in part should be deemed to be *ultra vires*, for the reason that such a method of acquiring money or an agreement to repay it, or its actual repayment, however acquired, was not within the purview of the statute, then the case presents itself as follows: The action is not brought to annul the arrangement made between appellees and the corporation, or to enjoin the taking of steps to carry it out. The contract has been executed on each side. No one interested raised any voice of protest prior to or at the time it was carried out, or when any steps were taken to perform it. Appellees advanced the money. The corporation received and used it for legitimate purposes. It made exactly the same use of the sum advanced by appellees that it would have made of a like sum paid on applications for insurance as contemplated by the statute. In the actual case the corporation created a liability to repay conditioned on its reasonable financial ability to do so. Had the statute been followed, the company, by receiving the money on insurance applications, the policies thereafter being is-

sued, would have created a liability conditioned on fire losses occurring. To the extent that the sum advanced by appellees is involved in this action the company repaid it. "The rule is now too thoroughly established to be longer open to question, that where a contract has been executed and fully performed on the part of the corporation, or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation." *Wright v. Hughes, supra*, and cases. "Where a corporation receives the money or property of another under an agreement or duty to account therefor it may be compelled to perform such duty though the transaction was *ultra vires*." 7 R. C. L. 677. Certain language used in *Rankin v. Emigh* (1910), 218 U. S. 27, 33, 30 Sup. Ct. 672, 54 L. Ed. 915, is worthy of consideration here, viz.: "No authority has been cited, and we think none can be, to deny the power of a banking corporation, or any other corporation, to disgorge property of another which it had got into its possession by any means whatever under a duty to disgorge. It may have had no legal power to take the steps by which the money of these plaintiffs' assignors came to its hands; but having taken such steps and obtained their money no such absurdity exists as a legal obstacle to its surrendering it. It would be a reproach to the law to hold any such doctrine of inequity. *Beloit v. Heineman*, 128 Wisconsin, 398, 401, (107 N. W. 334)." On the subject of the relation of the doctrine of *ultra vires* to executed contracts, see, also, the following: *State Board, etc. v. Citizens' St. R. Co.* (1874), 47 Ind. 407, 17 Am. Rep. 702; *Louisville, etc., R. Co. v. Flanagan* (1888), 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674; *Emigh v. Earling* (1908), 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243; *Manchester, etc., Railroad v. Concord Railroad* (1889), 66 N. H. 100, 20

Atl. 383, 9 L. R. A. 689, 49 Am. St. 582; *Central Transportation Co. v. Pullman's, etc., Car Co.*, 35 L. Ed. 55, note; *In re Assignment Mutual, etc., Ins. Co.* 70 Am. St., note 167.

We do not overlook the fact that when the transactions involved here were had appellees were members of the board of directors of the insurance company. It is universally held that transactions between a corporation and its managing officers or directors, wherein money is advanced to the former by the latter, will be carefully examined by the courts to determine whether such transactions were fair and just, and whether there has been any fraud or over-reaching on the part of such officers or directors. Such transactions when not duly authorized are usually regarded as voidable at the election of the corporation. *Bossert v. Geis* (1914), 57 Ind. App. 384, 107 N. E. 95, and cases; *Green v. Felton* (1908), 42 Ind. App. 675, 84 N. E. 166. But when such a transaction is not prohibited by law, "The broad doctrine that the officers of a corporation cannot in their own names contract with it is unreasonable. Such a holding would virtually deny to corporations the credit upon which their business may be transacted. If the right of the stockholders and officers of a corporation to advance money to it to carry on its affairs, or to endorse for it and obtain money for such purpose, is denied, it would result in depriving the corporation of its most ready and frequent source of credit. If directors can lend money to the corporation, or endorse for it, under the laws in this state, they should certainly have the right to collect their debt or be secured therein as is accorded by law to other creditors." *Levering v. Bimel* (1896), 146 Ind. 545, 554, 45 N. E. 775. See, also, *Bristol, etc., Mfg. Co. v. Probasco* (1878), 64 Ind. 406; *Twin-Lick Oil Co. v. Marbury* (1875), 91 U. S.

587, 23 L. Ed. 328; 2 Thompson, Corporations (2d ed.) §1247.

The transaction here has been submitted to the careful scrutiny of the trial court. The finding makes a very strong case that appellees' conduct was

6. characterized by openness and entire good faith.

They sought no advantage. They anticipated no gain to themselves. Having an eye single to the company's good, as they understood it, they ran the hazard of loss subsequently suffered. We do not believe that the receiver by virtue of his title acquired from the corporation can maintain this action.

We have yet to consider the case in its relation to the members and policy-holders of the corporation who by reason of advance payments on their policies

7. and by the payment of assessments on the call of the receiver may be deemed to be creditors of the

company. In fact there are no unpaid creditors except such members and policy-holders. "When a court has taken possession of the property of an insolvent corporation for administration, and appointed a receiver, the property of the corporation is a trust fund for the payment of its debts. * * * Such receiver represents the creditors as well as the stockholders and holds the property for the benefit of both. He is the trustee for both, and, as trustee for the creditors, can maintain and defend actions which the corporation could not." *Franklin Nat. Bank v. Whitehead* (1897), 149 Ind. 560, 583, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302.

The receiver in his capacity as representative of

8. the general creditors may avoid transactions had by the corporation in fraud of their rights.

Marion Trust Co. v. Blish, supra. As to claims

9. based on transactions had by a corporation, and which are binding on it but which are fraudulently prejudicial to the general creditors, the receiver

as a representative of the latter holds adversely to the former. High, Receivers (3d ed.) §315.

The second, third, and fourth conclusions of law deal with the case in its relation to members and policy-

holders as creditors with claims originating as

7. aforesaid. If, under the facts found, this action may be maintained by the receiver as the representative of such creditors, it is on the theory that they as members and policy-holders dealt with the company and became members and policy-holders in reliance on the belief that the sum of \$20,000 involved had been paid on applications for insurance as required by the statute, rather than that it had been advanced by appellees as aforesaid. The finding, however, renders the existence of any such belief impossible as to the greater number of the members and policy-holders. The finding is to the effect that as a general rule the members and policy-holders at the time they applied for insurance, and when the policies were issued, were fully and specifically informed respecting the advancing of such sum by appellees, and the arrangement by which it was to be repaid. With such knowledge they became members and policy-holders. Under the finding there were exceptions, but the class that acted with full knowledge was by far more numerous than the class that did not have such knowledge. The sum advanced by appellees became a part of a fund drawn on for the payment of dividends aggregating more than \$8,000. The members of each class alike received and retained dividends apportioned to them. It is apparent that as to the members of the class that had full knowledge of the facts, the foundation of the cause of action prosecuted in their behalf as beneficiaries has crumbled. By their acquiescence they are estopped. As having a bearing, see the following: *Bent v. Underdown* (1900), 156 Ind. 516, 60 N. E. 307; *Bruner v. Brown* (1894), 139

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Ind. 600, 38 N. E. 318; *Reel v. Brammer* (1913), 56 Ind. App. 180, 101 N. E. 1043; *Lea v. Iron Belt, etc., Co.* (1906), 147 Ala. 421, 42 South. 415, 8 L. R. A. (N. S.) 279, 119 Am. St. 93; *First Nat. Bank v. Gustin, etc., Mining Co.* (1890), 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. 510; *Hospes v. Northwestern, etc., Car Co.* (1892), 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. 637; *Hill v. Railroad* (1906), 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606, and note.

A cause of action exists then, if at all, in favor of a class of creditors, rather than in favor of all the general creditors. A receiver, as trustee for creditors, may prosecute only those causes of which all the general creditors are beneficiaries. Interests peculiar to a class of creditors, and from the benefits of which the general creditors are excluded, are not represented by a general receiver for purposes of vindicating rights based thereon by litigation. Otherwise would be to permit him to act in antagonism to the beneficiaries of the trust which he represents. It results that on the assumption that the receiver sues as trustee for the creditors, he cannot, under the finding, maintain this action. It follows that there is no error in the conclusions of law. *Marion Trust Co. v. Blish, supra*; *Sellers v. Hayes* (1904), 163 Ind. 422, 429, 72 N. E. 119; *Ellison v. Ganiard* (1906), 167 Ind. 471, 79 N. E. 450; *Reel v. Brammer, supra*.

Other questions presented are disposed of by our discussion of the conclusions of law. Judgment affirmed.

NOTE.—Reported in 114 N. E. 775. See under (2) 36 Cyc 1140; (3) 10 Cyc 1101; (4-7) 22 Cyc 1414, 1415.

SUPREME LODGE KNIGHTS OF PYTHIAS v. GRAHAM.

[No. 9,100. Filed January 25, 1917. Rehearing denied March 28, 1917. Transfer denied June 29, 1917.]

1. **APPEAL.—Review.—Evidence.—Sufficiency.**—In determining the sufficiency of the evidence to sustain the verdict, the court on appeal will look only to the evidence most favorable to appellee. p. 222.
2. **APPEAL.—Review.—Invited Error.—Instructions.**—Appellant cannot be heard to complain of an instruction as being outside the evidence, where it tendered an instruction embodying the same legal proposition. p. 224.
3. **APPEAL.—Subsequent Appeal.—Law of the Case.**—In an action upon a contract of insurance issued by a fraternal order, the holding of the Appellate Court in a former appeal that the acceptance of the written application constituted a written contract of insurance is the law of the case on a subsequent appeal. p. 224.
4. **EVIDENCE.—Fact in Issue.—Conclusion.**—In an action upon a fraternal order certificate of insurance, a question to a witness to elicit an answer as to when he determined to approve an application for insurance and accept the risk was improper, as calling for a conclusion, where it was for the jury to determine the time of the final approval of the insurance contract. p. 225.
5. **WITNESSES.—Examination.—Assumption of Fact.**—In an action on an insurance contract, a question to a witness as to the date when he determined to approve an application for insurance and accept the risk was improper as assuming that he had authority to approve the application and accept the risk, and that he determined to do so. p. 225.

From Benton Circuit Court; *Burton B. Berry*, Judge.

Action by Etta Graham against the Supreme Lodge Knights of Pythias. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Stansbury & Billings and *Fraser & Isham*, for appellant.

John J. Hall, *E. G. Hall*, *Samuel R. Artman* and *William H. Smith*, for appellee.

IBACH, P. J.—This is an action by appellee against appellant on a contract of insurance. From a judg-

ment for appellee, appellant appeals. This is a second appeal. In the former appeal (*Supreme Lodge, etc. v. Graham*, 49 Ind. App. 535, 97 N. E. 806), this court reversed a judgment in favor of appellee on the evidence. The only error discussed in appellant's brief is the overruling of its motion for a new trial. The grounds of such motion relied on question the verdict as not being sustained by sufficient evidence and as being contrary to law, the giving or refusal to give certain instructions and the exclusion of certain evidence. The cause was submitted to a jury for trial on the issues formed by the second paragraph of the complaint and the several paragraphs of answer filed by appellant. These pleadings are substantially the same, if not identical, with those of the former trial.

The propositions by which appellant seeks to sustain its assigned error in the overruling of its motion for a new trial are as follows: "1. This case, having been, on former appeal, reversed on the ground that the evidence was not sufficient to support the verdict, and the evidence in the retrial being in all respects substantially the same as in the former trial, the opinion of this court in the former appeal is the law of this case, and decisive of the insufficiency of the evidence. 2. Aside from the rule of the law of the case, the evidence is not sufficient to support the verdict. 3. Before the application to appellant for insurance could become binding it was necessary that there be an acceptance by appellant and notice thereof, actual or constructive, be given to the applicant during his life and instructions so declaring the law were erroneously refused. 4. The instructions given that if the jury found that appellant by a custom established had treated the approval of the Medical Examiner in Chief as acceptance by the Board of Control then approval by such Medical Examiner in Chief would be sufficient to warrant a verdict

for the plaintiff, were erroneous because no evidence of such custom was given. 5. The court erred in not permitting appellant's certificate clerk to testify as to when he determined to accept the application."

The jury found in favor of appellee on all the essential averments of the complaint and in determining the sufficiency of the evidence to uphold such ver-

1. dict we are to take the evidence most favorable to the appellee.

It is apparent that the jury found that the application was accepted or finally approved on April 11, 1905. If there is any evidence to sustain such finding, directly or by inference, the trial court did not err in overruling the motion for a new trial on the ground of insufficiency of the evidence. As we view the case, the sufficiency of the evidence is not made to depend entirely upon the custom in appellant order. To illustrate such view we refer to the evidence in the former trial given by William L. Hunt where he testified "that the application was approved late in the afternoon of April 12; that he made the indorsement on the back of the certificate (application) showing that it was approved (and the indorsement itself so shows); that the certificate was then mailed to Mr. Walker at Indianapolis, Indiana." After setting out the above evidence and in a discussion of the testimony of Mr. Walker given on that trial, this court says: "If there were some evidence tending to show that the certificate of membership was received in Indianapolis on April 12, the inference could be properly drawn that it was written on April 11, in Chicago." The court then holds that the testimony of Walker as to the time of receiving the certificate was so indefinite and uncertain in its meaning as to be entitled to no weight whatever as evidence, and reversed the case on such point.

In other words, where the testimony of different wit-

nesses was at variance, it was the duty of the jury to reconcile such testimony if possible. If, as according to Hunt's testimony, the certificate was not mailed in Chicago until after its acceptance and final approval, and it was actually received in Indianapolis on the morning of April 12, this would be evidence from which the jury might properly infer that it was accepted and finally approved on April 11. This is the effect of the holding in the former appeal and, as the testimony of Mr. Hunt in the present appeal is not materially different, we need not consider the question of custom if there is any evidence tending to show that the certificate of membership was received in Indianapolis on April 12.

James W. Walker testified on this question that, "To the best of my recollection I had it on the 12th day of April at nine o'clock' * * * 1905 * * * a.m."; that he procured the certificate from the post office in Indianapolis, Indiana, postmarked Chicago, Illinois. This same witness also testifies that he sent some money to Mr. Held on the day he received the certificate, and to the best of his knowledge it was April 12. Further this witness testified, "To the best of my belief and before my God, I got that (referring to the certificate) on the 12th day of the month, between nine and ten o'clock." The deficiency in the evidence pointed out in the former opinion was thus supplied and when taken with the testimony of Mr. Hunt warranted the jury in drawing the inference that the application was accepted by the board of control on April 11. Under the law of the case there was evidence to support the verdict.

Appellant complains of Nos. 2 and 6 of the court's instructions. The objection is that they went entirely beyond the evidence. Each of these instructions told the jury that if the appellant had by a course

of conduct established and fixed a general custom of treating and accepting the approval of the applications by the medical examiner in chief as an acceptance thereof by the board of control, then the acceptance by the medical examiner in chief amounted to an acceptance by the appellant. There was some evidence of such custom and the court committed no error in the giving of the instructions. A further and additional reason why appellant should not be heard

2. to complain is that by instruction No. 16 tendered by it the same legal proposition was stated as the law with reference to the certificate clerk. Complaint is made of the refusal of the court to give certain instructions tendered by appellant. These instructions are predicated on the theory that the application of Bailey was an offer and to constitute a contract there must be shown an acceptance of such offer and notice thereof, either actual or constructive, to Bailey during his life; and that the mailing of the certificate of membership to appellant's agent at Indianapolis, for delivery to Bailey, did not constitute notice to Bailey or prevent appellant from recalling from its agent in Indianapolis such certificate and notice; and that therefore the mailing of such certificate to the appellant's agent at Indianapolis for delivery to Bailey did not consummate a contract.

In this appeal the law of the case determines this question. It was claimed on behalf of appellant in the former appeal that the acceptance of the written

3. application constituted a written contract of insurance. And this court in effect so held. The appellant's substantial rights were not affected by the refusal to give such instructions and no reversible error was committed.

It is next insisted that the court erred in refusing to permit the witness William L. Hunt to state the date

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when he determined to approve the application

4. and accept the risk. This witness was permitted to and did testify that the final approval of the application was on April 12 in answer to other questions. The only purpose of the testimony elicited by the question complained of would be to establish the time of final approval. This was one of the questions for the jury to determine and a question calling for a conclusion of the witness was not proper. Such question was also improper for the reason that

5. it assumed that the witness had authority to approve the application and accept the risk, and that the witness did determine to approve the application and accept the risk. *Indianapolis, etc., Transit Co. v. Walsh* (1909), 45 Ind. App. 42, 90 N. E. 138; *Eckhart v. Fort Wayne, etc., Traction Co.* (1913), 181 Ind. 352, 104 N. E. 762.

No available error having been shown, the judgment of the trial court is affirmed.

NOTE.—Reported in 114 N. E. 879.

DEAN, ADMINISTRATRIX, v. THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[No. 9,223. Filed February 23, 1917. Rehearing denied May 16, 1917. Transfer denied June 29, 1917.]

1. RAILROADS.—*Injury to Licensee.—Duty of Railroad Company.*—In an action against a railroad company for wrongful death, where the evidence shows that the railroad in switching cars in the yards about an elevator had knowledge that it was customary for the elevator company's employees, in going from one building to another, to cross the switch tracks between cars standing thereon, the railroad was under a duty to use reasonable care in switching its cars to avoid injuring such employees and its failure to do so is actionable negligence. (*Lake Erie,*

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etc., R. Co. v. *Gaughan* [1900], 26 Ind. App. 1, overruled.) pp. 231, 232.

2. RAILROADS.—*Injury to Licensee.—Duty of Railroad Company.—Negligence.—Contributory Negligence.—Jury Question.*—Where a railroad company switched cars in a yard about an elevator with knowledge that workmen employed at the elevator, in going from one building to another, frequently passed over the switching tracks between cars standing thereon, and an elevator employe was crushed and killed between two cars which the railroad's switching crew moved without warning, it was a question for the jury whether the railroad's duty to exercise reasonable care had been discharged and whether in passing between the cars decedent was guilty of contributory negligence. p. 231.
3. NEGLIGENCE.—*Imputed Negligence.—Employer and Employee.*—Where a railroad company switched cars in an elevator yard with knowledge that it was customary for workmen employed at the elevator, in going from one building to another, to pass between cars standing on the tracks, though it may have been the duty of the elevator company to warn its employes of the danger of passing between cars, its failure to do so would not excuse the negligence of the railroad company. p. 231.
4. TRIAL.—*Directing Verdict.*—Questions of fact must be submitted to the jury for its determination whenever the evidence furnishes reasonable grounds for inferring the facts essential to a recovery and it is only where there is a total absence of some substantial evidence upon an essential issue or when there is no conflict and the evidence is susceptible of but one inference and that favorable to the party asking for a peremptory instruction that such an instruction shall be given. p. 232.

From Sullivan Circuit Court; *William H. Bridwell*, Judge.

Action by Sarah Dean, administratrix of the estate of William H. Dean, deceased, against The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

A. L. Miller, *Harry S. Wallace* and *Orion B. Harris*, for appellant.

Beasley, *Douthitt*, *Crawford & Beasley* and *Hays & Hays*, for appellee.

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IBACH, P. J.—An action to recover for the death of William H. Dean, alleged to have been caused by appellee's negligence. The complaint proceeds upon the theory that appellee was negligent in operating an engine and cars on a certain sidetrack and switch at the plant of the Vigo Elevator Company near Terre Haute, Indiana, where decedent was working when injured.

At the close of appellant's evidence appellee moved for a peremptory instruction, which motion was sustained; the jury was directed to return a verdict for appellee, and this was done. Appellant's motion for a new trial challenging the ruling of the trial court in directing the verdict is the sole error assigned.

The buildings and yards of the Vigo Elevator Company are located between appellee's railroad and other railroads and are connected with such railroads by a number of switch tracks. These railroad companies delivered cars into the yards of the elevator company and over separate tracks for the accommodation of each.

In delivering the cars into the yards they would simply place them on their particular tracks and afterwards they were located as desired by the elevator company by a switch engine and switching crew. Cars that were to be unloaded in the main building were brought up to the north end of the unloading track and were placed on the unloading track as directed by the representative of the elevator company having that work in charge. They were usually placed near the north end of the building and were afterwards drawn into the building by means of a cable operated by the employes of the elevator company. At other times the cars were pushed into the building by the same switch engine used for bringing the cars to the unloading track. There was sufficient room on this track within the main building for two cars and no more. Whether

the loaded cars were pulled into the building by the cable or pushed in by the engine, when they were brought in they would shove out of the south side of the building any empty cars that at the time were within the building on the same unloading track. As these empties were not attached to an engine they would simply roll out of the building only so far as the momentum received from the contact with the incoming cars would send them. When they stopped these empties would sometimes come together and sometimes they would be left standing with open spaces between them. The switching crew referred to did all their work in the elevator yards and had nothing to do with transferring cars between the yards and the different railroads. When the switching crew was ready to place the loaded cars brought into the yards they would so notify the elevator company, and they would then place them as directed. The several tracks used by this crew were constructed by appellee for the elevator company, and the switch engine was one of appellee's engines and the members of the switching crew were in the employ of appellee. About eleven o'clock in the morning of the day of the accident there had been two empty cars standing on the unloading track at the south end of the main building. They were coupled together. One of them was entirely without the building, the other partly so. South of these two cars there were other empties standing on the same track. The yards of the elevator company were spacious, many buildings composing its plant and all separated by the various switch tracks. Decedent for several weeks before his death had charge of the repair work about the elevator company's plant and was also employed in installing new machinery, and his work required him to visit the several buildings frequently, and in doing so he was required to and did pass over the various switch tracks

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and over and between cars standing thereon. When there were openings between the cars it was customary for the workmen generally to pass back and forth over the tracks and between the cars standing thereon and this fact was known to the members of the switching crew. On the day Dean was killed the switching crew pushed the loaded cars into the building and against the two cars standing there, and when they were set in motion they closed up the space between them and other empties next to them to the south, and caught decedent as he was passing through such open space, and this was done without any notice or warning first being given or without any one guarding the open spaces between such cars. There seems to be some slight variance in the evidence, but the statement we here have made is a fair abstract of all the evidence bearing upon the question involved.

It is insisted that the court erred in directing the verdict because there was some evidence to establish every material averment of the complaint necessary to a recovery. On the other hand appellee contends that the evidence fails to show any legal duty resting upon the employees who performed the work complained of to protect the decedent from injury, but that it does show that the work of switching the cars was done in the yards of the elevator company and under its direct orders and control, and if the evidence did show that the switching crew was negligent in handling the particular cars causing the injury, their negligence could not be imputed to appellee because there was no competent evidence to show that such crew were servants of appellee. Upon this last proposition the evidence clearly shows that the appellee company is usually called the "Big Four." Witness Bean testified that the switch engine was a Big Four engine. In his examination he was asked the question: "Q. Do you know in

whose employ Duddleston and Fleming and this crew were? A. Yes sir. Q. In whose employ were they? A. New York Central Lines. Q. What is that company usually called there in Terre Haute in whose employ they were? A. Usually goes by the name of Big Four." Without going further into the particular questions and answers on this branch of the case, it is sufficient to say that there was other evidence of the same character that would fully support the inference that at the time of the doing of the acts complained of the servants operating the engine and moving the cars were the servants of appellee.

It is fair also to state that a jury trying the cause would have a perfect right to conclude from the evidence that the elevator company did not direct, advise, or control the manner of switching any of the cars in its yards, but that the way of doing it was left to appellee's servants alone. The elevator company alone made the selection of the location where the particular car or cars were to be placed in its plant, and gave the order to switch them to such location. Thus far and no farther does the evidence show any control of the elevator company over the men employed in the work of switching.

We pass to the question as to whether the facts show that there was any legal duty resting upon appellee's servants who performed the acts complained of to protect the decedent from injury. The report of the evidence hereinbefore set out discloses that there was some evidence that appellee's agents and servants knew, or should have known, of the custom and habit of the employes of the elevator company to use the opening left between the cars as a passage way for them in going to and from different parts of its plant long before the cars in question were shoved against the cars which came together crushing the decedent. They

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knew, or should have known, that if cars were shoved together in the manner in which they were then engaged in performing that part of their work in the elevator company's yards, the laborers employed by that company would not know that the spaces between the standing cars and through which they were passing would be closed unless they had warning or notice from some one. There is evidence, and it seems to be conceded, that no notice or warning was given by appellee's servants to decedent of the movement of the switch engine and cars, and there is no evidence that he received any notice of any kind from any other source.

It seems to us that the facts of this case necessitate the application of the well-recognized principle of law, that a duty may arise out of a known situation

1. or condition, and that a violation of that duty may result in actionable negligence. This is the same principle which has been so fully considered by this court in the cases of *Tippicanoe Loan, etc., Co. v. Cleveland, etc., R. Co.* (1914), 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739; *Belt R., etc., Co. v. McClain* (1914), 58 Ind. App. 171, 106 N. E. 742; *Cleveland, etc., R. Co. v. Means* (1915), 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 375, as to require no further discussion here.

The facts presented by the record show a duty owing by appellee to the decedent to exercise reasonable care to avoid injuring him, and it was a question for

2. the jury, under proper instructions, whether such duty had been discharged. Contributory negligence was likewise a question for the jury.

Appellee, however, claims that it was the duty of the elevator company to give warning and notice of danger to its employes in view of the conditions and cir-

3. cumstances as then existed. If it be conceded that such duty did exist on the part of such com-

pany, its failure to perform that duty will not excuse or exonerate appellee for failure to perform its duty towards the injured party. *Jacowicz v. Delaware, etc., R. Co.* (1914), 87 N. J. Law 273, 92 Atl. 946, Ann. Cas. 1916B 1222.

In all cases such as the present questions of fact must be submitted to the jury for its determination whenever the evidence furnishes reasonable

4. grounds for inferring the facts essential to a recovery, and it is only where there is a total absence of some substantial evidence upon an essential issue or when there is no conflict and the evidence is susceptible of but one inference and that inference favorable to the party asking for a peremptory instruction that such an instruction should be given. *Abelman v. Haehnel* (1914), 57 Ind. App. 15, 103 N. E. 869; *Lyons v. City of New Albany* (1913), 54 Ind. App. 416, 103 N. E. 20, and cases cited.

Appellee apparently relies very strongly on the case of *Lake Erie, etc., R. Co. v. Gaughan* (1900), 26 Ind.

App. 1, 58 N. E. 1072. In many respects that

1. case is distinguishable from the facts of the present case; but in so far as such case is in conflict with this opinion it is overruled. In so holding we are but following the later and better-reasoned authorities upon such question. *Prest-O-Lite Co. v. Skeel* (1914), 182 Ind. 593, 106 N. E. 365; *Marion Shoe Co. v. Eppley* (1913), 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D 220; *Fitzpatrick v. Michigan Central R. Co.* (1907), 149 Mich. 194, 112 N. W. 915; 1 Labatt, Master and Servant §§25, 66.

Judgment reversed, with instructions to sustain appellant's motion for a new trial and for further proceedings not in conflict with this opinion.

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NOTE.—Reported in 115 N. E. 92. Railroads: duty of, to persons, other than trespassers, on or near its track, 59 Am. Rep. 27, 20 Am. St. 453. See under (2) 33 Cyc 897.

INDIANA UNION TRACTION COMPANY v. HIATT,
ADMINISTRATOR.

[No. 8,990. Filed December 20, 1916. Rehearing denied February 16, 1917. Transfer denied June 29, 1917.]

1. CARRIERS.—*Injuries to Persons at Station.—Duty of Company.*—Where an interurban railroad, by its manner of operating its road, extended an invitation to all persons to station themselves near the tracks at a highway crossing, within a reasonable time before the arrival of a local car, if they desired to embark thereon as passengers, and to signal such car to stop by burning a match or scrap of paper, the road was under a duty to exercise reasonable care, in the operation of cars at such point, for the safety of one at the crossing who had given the customary signal to stop the car and was waiting to embark thereon. p. 239.
2. NEGLIGENCE.—*Duty to Use Due Care.*—Where a duty to exercise reasonable care is shown to exist, a failure to exercise such care is negligence. p. 241.
3. RAILROADS.—*Injuries to Persons at Station.—Complaint.—Negligence.*—In an action against a railroad for wrongful death, where the averments of the complaint disclosed the existence of a relation between the road and decedent imposing a duty on defendant to exercise reasonable care, a general charge of negligence is sufficient as against demurrer. p. 241.
4. RAILROADS.—*Injuries to Persons at Station.—Action.—Complaint.—Sufficiency.—Contributory Negligence.*—In an action against a railroad for wrongful death, where the complaint contained general averments that decedent was in the exercise of due care and was free from negligence, and the facts specifically averred do not affirmatively show as a matter of law that decedent was guilty of contributory negligence, the complaint is sufficient as against the objection that it affirmatively shows that decedent was guilty of negligence contributing to her death. p. 241.
5. RAILROADS.—*Injuries to Persons at Station.—Answers to Interrogatories.—Contributory Negligence.*—In an action against an interurban railroad company for wrongful death, the action being predicated on defendant's failure to stop its car

on signal at a certain highway crossing in accordance with an established custom, findings by the jury in answers to interrogatories that defendant had been in the custom of stopping its local cars, when signaled, at a certain highway crossing to take on passengers, that plaintiff's wife was killed on the tracks by a limited car running on the schedule of a local car, the limited, when signaled by decedent's husband, having given two short blasts of the whistle, the usual response, and that decedent tried to cross the track ahead of the approaching car, did not affirmatively show decedent guilty of contributory negligence in attempting to cross the tracks in front of the car, the headlight of which blinded her so that she was unable to comprehend the situation, for the purpose of getting to the right side of the track to board the supposed local car, and such findings are not inconsistent with the general verdict for plaintiff. p. 242.

6. RAILROADS.—*Injuries to Persons at Station.*—*Action.*—*Contributory Negligence.*—*Question for Jury.*—In an action against an interurban railroad for death at a highway crossing, where the evidence showed that it was the road's custom to stop its local car for passengers at a highway crossing when signaled to do so, that decedent's husband signaled an approaching limited car running on the schedule of the local car, that the motorman gave two short blasts of the whistle, the usual response to a signal to stop, and that decedent, blinded by the car's powerful headlight and hindered thereby from comprehending the situation, was killed while attempting to cross the tracks ahead of the supposed local car in order to get to the proper place to board the same, the question of decedent's contributory negligence was for the jury. p. 244.

7. RAILROADS.—*Injuries to Persons at Station.*—*Action.*—*Evidence.*—*Admissibility.*—*Prejudicial Error.*—In an action against an interurban railroad for wrongful death, where it was charged that decedent was killed on a crossing by failure of defendant to stop its car upon the giving of the customary signal in answer to which the motorman had made the usual response, two short blasts of the whistle, the admission of testimony by a locomotive engineer that, upon such a signal as was given, proper railroading requires that the whistle be sounded two short blasts and that the locomotive be brought to a stop, was prejudicial error, since it was given by a witness not qualified as an expert in the operation of electric interurban cars and the evidence had a tendency to confuse the jury, because foreign to the theory of the complaint, which did not predicate negligence on the mere fact that the car failed to stop on being signaled, but upon the fact that defendant's

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motorman, having given the customary response to the signal to stop, thereby led decedent to believe that the car would slow down and stop at the crossing. pp. 246, 247, 248.

8. *APPEAL.—Harmless Error.—Admission of Evidence.*—If evidence is clearly immaterial, its erroneous admission is generally held to be harmless. p. 246.
9. *APPEAL.—Review.—Evidence. — Erroneous Admission. — Presumptions.*—If testimony is directed to some issue, or to some material question involved in the controversy, and its nature is such that it may have exercised some influence in determining such issue or question, its erroneous admission will be presumed to have been prejudicial, unless it otherwise affirmatively appears from the record. p. 247.
10. *EVIDENCE.—Opinion Evidence.—Operation of Electric Car.—Competency of Witness.*—Experience in operating a locomotive engine does not necessarily or even presumptively qualify a person to operate an interurban electric car, or to speak as an expert with reference to what good railroading requires in operating such cars. p. 248.
11. *RAILROADS.—Injuries to Persons at Station.—Action.—Signals from Car.—Evidence. — Admissibility.*—In an action against an interurban railroad for wrongful death, plaintiff's action being predicated on defendant's failure to stop its car on signal on a highway crossing, where plaintiff introduced evidence that it was the custom of motormen on local cars to give two short blasts of the whistle when they intended to stop in response to signal, it was permissible for defendant to introduce evidence that proper operation required all cars to give such a response to signal, but that only local cars stopped, the response merely indicating that the signal had been observed, as such testimony was pertinent to the question whether deceased was justified in believing that an approaching car, which struck decedent as she was attempting to cross the track, was going to stop. p. 250.
12. *APPEAL.—Briefs.—Sufficiency.—Specification of Errors.*—Although points in appellant's brief are somewhat general, it is the duty of the court on appeal to give them consideration where there is no difficulty in ascertaining the ruling to which they are directed. p. 255.

From Wells Circuit Court; *Robert M. Van Atta*, Special Judge.

Action by Daniel W. Hiatt, administrator, against the Indiana Union Traction Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

James A. Van Osdol, William A. Kittenger, William L. Diven, Albert Diven and Simmons & Dailey, for appellant.

Alfred Henry and Edwin C. Vaughn, for appellee.

CALDWELL, J.—Appellee, as administrator of the estate of his deceased daughter-in-law, Anna Hiatt, brought this action to recover damages for personal injuries to his decedent resulting in her death, caused by one of appellant's cars striking her, as she was attempting to cross appellant's tracks at a private crossing, known as "Hiatt's Crossing," in Grant county. A trial before a special judge and jury resulted in a verdict for \$4,000, on which judgment was rendered.

The following points urged in the trial court in support of the demurrer to the complaint are properly presented for our consideration: That the complaint does not disclose by proper averments: (1) That appellant owed decedent any duty to exercise care for her safety; (2) or that appellant was guilty of negligence; (3) or that negligence, if shown, was the proximate cause of decedent's injury and death; (4) that it affirmatively appears from the complaint that decedent was guilty of negligence which contributed to her injury and death.

The complaint is substantially as follows: Appellant operated an interurban electric railroad from Marion southward through Jonesboro and Summitville to points beyond. The railroad passed through a farm situated between Marion and Jonesboro, upon which decedent lived with her husband and children. The farm residence was about 150 feet east of the railroad. A private road extended across the farm passing westward near the north side of the residence and thence intersecting the railroad at grade. The intersection was designated by appellant and others as "Hiatt's Crossing." Hiatt's Crossing was, and for a number

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of years had been, a stop on appellant's railroad where passengers were received on and discharged from certain local cars, among them a car running between Marion and Summitville, and known as the Summitville car. Such local cars, however, stopped at Hiatt's Crossing to receive passengers only on signal. The signal in common use after dark was a burning match or burning paper held or waved from a point on or near the track. It had been the custom of decedent and the members of her family for a number of years to do their trading at Jonesboro, and to that end to embark on the Summitville car from said crossing. In one of its daily trips southward this car was scheduled to arrive at the crossing about 6:50 p.m. It had long been the custom of decedent and members of her family and others, when desiring to take passage on said car at Hiatt's Crossing, when it arrived after dark, to signal it as above indicated, whereupon the motorman in charge, on seeing such signal, invariably made answer by two short blasts of the whistle, thereby indicating that the signal had been observed and that the car would be brought to a stop, and he thereupon invariably did bring his car to a stop at the crossing, and received as passengers the persons so signaling. On the evening of September 17, 1910, decedent and her husband went from their residence to the crossing, the husband being some distance in advance, for the purpose of taking passage on the Summitville car, to go to Jonesboro to do their trading. The husband arrived at the crossing at about 6:50, that being the time at which such car usually arrived, and seeing the light of an approaching car several hundred feet north and, supposing it to be the Summitville car, he signaled it by using a lighted match, whereupon the motorman in charge of such approaching car, "in response to said signal so given by decedent's said husband, carelessly and negli-

gently then and thereupon immediately answered that said car would stop at said crossing, by giving the usual two short whistles." Decedent at such time was near the track, but on the east side thereof, and, seeing the signal and hearing the response thereto, she believed from her past experience that the car would stop. Appellant received passengers on south-bound cars at such crossing only from the west side of the track. Decedent, knowing such fact, and being on the east side of the track when she heard the answering signal, immediately started to cross the track, when she reached the west rail, "and while in the exercise of due care upon her part, she was carelessly and negligently struck with great force and violence by said car" and instantly killed. The car that struck her was a limited car, which should have, and usually did, arrive at the crossing some minutes before the Summitville car, but at this time the former was running on the time of the latter. The latter usually passed the crossing at a speed of twenty to thirty miles per hour, but the former was running "at the dangerous and reckless rate of fifty to sixty miles per hour." After answering the signal the limited car did not stop or slacken speed, but by defendant's motorman in charge it was "wrongfully and carelessly and negligently caused to continue its high speed of some fifty to sixty miles per hour, over and across said crossing." The glare of a powerful headlight with which the car was equipped made it impossible for decedent to distinguish a limited from a local car, or to determine the speed or distance of the car, and her only means of knowing whether the car was slackening speed, and whether it would stop was the fact of said answering signal, as appellant knew when said motorman gave such a signal. Decedent believed that said car was the local car, and that it would stop, because two sounds of the whistle were

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carelessly and negligently given as aforesaid, and, so believing, decedent, in the exercise of due care and without any negligence on her part, and believing that she would have ample time to cross the track before the car arrived, attempted to do so, and was killed as aforesaid. Had appellant slackened the speed of the car and brought it to a stop, as its signal indicated, and as it thereby promised, she could have crossed the track in safety. It is alleged that the proximate cause of decedent's injury and death was: "That said defendant carelessly and negligently gave its signal of two short whistles to stop its said limited car, when in fact and in truth it then and there did not intend to stop said car, and carelessly and negligently failed and neglected to in any manner check the speed of said car, after having given said signal to stop, or in any manner to obey its said signal, and carelessly and negligently continued its high and dangerous rate of speed over and across said crossing, and against plaintiff's decedent, at the rate of speed of from 50 to 60 miles per hour.

"That had said defendant slackened the speed of said car, as its signal indicated, and had it brought its car to a stop at said crossing, as it promised decedent by its said signal that it would do, decedent would have had ample time in which to cross the track in safety, and could and would have safely reached the said place of embarkation, as fixed by defendant aforesaid, and her death would not have occurred."

Proceeding to apply the law to the facts averred respecting the first objection urged against the sufficiency of the complaint, it appears that appellant, by

1. its manner of operating its road, extended to all persons at least impliedly an invitation to station themselves at Hiatt's Crossing near the track, within a reasonable time before the arrival of a local car, in case they desired to embark as passengers on

such car from such stop. Appellant likewise extended to such persons an invitation, or gave them a direction, to make known to the operators of such an approaching car their presence and purpose by a signal established and understood by virtue of custom. In acceptance of such invitation decedent, as one of such persons, at the time involved here, had so stationed herself for the purpose aforesaid, and, observant of such direction, had caused the signal to be given. She was therefore in a proper place at a proper time, and at a place where at the time she had a lawful right to be, and in the usual manner had indicated her presence. She was there in acceptance of appellant's implied invitation. Appellant was bound to anticipate the presence of all persons who might be at such crossing at proper times, in acceptance of such invitation, and hence was chargeable with knowledge of decedent's presence, especially after her presence had been indicated in the usual manner. Under such circumstances, it matters not whether the relation between decedent and appellant be deemed to be that of passenger and carrier, or only that of a prospective passenger and carrier, out of such relation there arose, as a matter of law, a duty as against appellant in the operation of its car to exercise reasonable care for decedent's safety. The complaint is therefore sufficient as against the first objection. *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co.* (1914), 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739; *Pere Marquette R. Co. v. Strange* (1908), 171 Ind. 160, 84 N. E. 819, 85 N. E. 1026, 20 L. R. A. (N. S.) 1041; *Indiana Central R. Co. v. Hudelson* (1859), 13 Ind. 325, 74 Am. Dec. 254; *Cleveland, etc., R. Co. v. Jones* (1912), 51 Ind. App. 245, 99 N. E. 503; *Warner v. Baltimore, etc., R. Co.* (1897), 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; *Metcalf v. Yazoo, etc., R. Co.* (1910), 97 Miss. 455, 52 South. 355, 28 L. R. A. (N.

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S.) 311; *Karr v. Milwaukee Light, etc., Co.* (1907), 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283, 122 Am. St. 1017.

Where a duty to exercise reasonable care is shown to exist, a failure to exercise such care is negligence.

As we have said, the averments of the complaint

2. here disclosed the existence of a relation from which there arose the duty to exercise reasonable care. Under such circumstances, a general
3. charge of negligence is sufficient as against demurrer. It is therefore apparent from the foregoing abstract of the complaint that it is sufficient as against the second objection urged. *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co., supra; Indianapolis, etc., R. Co. v. Wall* (1913), 54 Ind. App. 43, 101 N. E. 680. As to the third objection, it is specifically averred that the negligence charged was the proximate cause of decedent's injury and death.

The complaint contained general averments that decedent was in the exercise of due care, and that she was not guilty of any negligence in the transaction

4. wherein she was injured and killed. Certain facts are specifically averred, but they do not, in our judgment, affirmatively show as a matter of law that decedent was guilty of contributory negligence. The complaint is therefore sufficient as against the fourth objection urged. *Chicago, etc., R. Co. v. Coon* (1911), 48 Ind. App. 675, 93 N. E. 561, 95 N. E. 536; *Greenawaldt v. Lake Shore, etc., R. Co.* (1905), 165 Ind. 219, 74 N. E. 1081; *Cleveland, etc., R. Co. v. Lynn* (1908), 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017; *Indiana Bridge Co. v. Shepp* (1914), 182 Ind. 610, 108 N. E. 107; *Warner v. Baltimore, etc., R. Co., supra.*

Appellant's motion for judgment on the facts found in answer to interrogatories was overruled. It is con-

tended that in such ruling the court erred. The

5. basis of the contention is that such facts as interpreted and measured by appellant show affirmatively that decedent was guilty of contributory negligence. In a general way the facts found are in harmony with the allegations of the complaint. Those calling for special attention are to the following effect: The limited car was scheduled to leave Marion at 6:25 p. m. and the Summitville car at 6:30, the former as scheduled arriving at Hiatt's Crossing about fifteen minutes in advance of the latter, which fact was known to decedent. On this occasion, the former left Marion at 6:30, and passed the latter on the outskirts of the city, arriving at the crossing practically on the time of the latter. Decedent and her husband, hearing the approach of the car, went hurriedly from their home to the crossing. The husband, being in advance, arrived first, the car then being more than a half mile up the track, its headlight being in plain view. The car having approached to within 800 feet, he signaled it. The motorman saw the signal, and gave in response two short blasts of the whistle. The car gave no other signal. The motorman saw decedent's husband standing by the side of the track as the car approached. When the car was about 125 feet distant, the motorman first saw decedent. She was then six feet from the track, and moving hurriedly towards it. As soon as the motorman discovered that decedent intended to cross the track, he made a good-faith effort to stop the car. It was running fifty-five miles per hour.

With the facts so specifically found, certain others alleged in the complaint must be grouped in reviewing the ruling of the court now under consideration. Thus it had been the uniform practice at this crossing for certain local cars, including the Summitville car, to stop on signal, and also for the motorman in charge of such

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a car, the proper signal being given, to respond thereto by two short blasts of the whistle, thus indicating that the car would stop. Decedent was fully informed respecting such custom. We must assume, also, that on this occasion decedent knew that the signal had been given and responded to, and that she interpreted the situation in the light of such custom. In view of the allegations of the complaint, we must assume that by such answering signal the motorman did indicate that the car would stop. Appellant's manner of operating its road then had created in decedent's mind a concept of which the elements were a certain time, a definite place, a car approaching in the night at a certain speed, a signal and its response, resulting in a slackening car, brought to a stop. It was with reference to such concept that decedent acted. Appellant here reproduced practically all the elements of such concept, except the result. The actual occurrence was in harmony with the image in decedent's mind as to the place, approaching car, signal, and response. It differed in that the speed was materially greater, and that the car neither stopped nor slackened. The elements wherein the occurrence differed from the concept were the potent factors leading to decedent's injury and death. Had the car been running at the usual speed of the local car, or had it stopped or slackened, decedent would have escaped. Appellant knew that these differences existed; decedent did not. True, had decedent realized her peril when the motorman did, and had she thereupon been as vigilant as the motorman, it is likely there would have been no accident. The motorman, however, was more favorably situated than decedent. He was not blinded by a light. He knew his speed, his distance, and the fact that he was not slackening speed, and that he did not intend to stop. He knew, also, from the fact that his car was hailed, that decedent believed it to be the

local car. It is alleged in the complaint, and common experience teaches one that the allegation is not unreasonable, that the glare of the headlight concealed all of these facts from decedent. It is not a case here of a person rushing blindly in front of an approaching car with no sort of knowledge of its distance or speed. Her conduct was prompted by her previous experience. It is therefore our judgment that the facts found do not affirmatively convict decedent of contributory negligence, and that consequently such facts are not inconsistent with the general verdict. The court did not err in overruling the motion for judgment.

Appellant, in support of its contention that the evidence is insufficient to sustain the verdict, states points bearing on the sole proposition that it affirmatively appears from the evidence that decedent was guilty of contributory negligence. We shall therefore confine our discussion to the same limits.

The evidence bearing on the issue of contributory negligence, including inferences legitimately deducible therefrom, is substantially the same as the facts

6. set out in connection with our discussion of the answers to interrogatories. In some respects there were conflicts in the evidence. Thus, several witnesses testified that they heard no whistle at all as the car approached the crossing. A number of others testified to hearing two short blasts. The motorman in charge of the car testified that he sounded the regular public highway crossing signal, consisting of two long and two short blasts at a public highway crossing north of Hiatt's Crossing, and that he repeated such signal when he saw the hail given by decedent's husband. The jury therefore were warranted in finding, as was specifically done in answer to an interrogatory, that decedent's husband's signal was responded to by two short blasts. A rule of the company was introduced to

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the effect that two short blasts of the whistle should be given in response to any signal in the absence of specific provision in the rules to the contrary, and another rule that: "When a signal except a fixed signal is given to stop a train, it must be answered by two short blasts of the whistle." There was also conflicting parol testimony respecting the significance of such a signal when given in response to a hail, there being testimony that it signified only that the hail was observed, and other testimony that it indicated in addition that the car would stop. The evidence that at this crossing certain local cars, in response to the hail, uniformly sounded two short blasts of the whistle, and thereupon brought the car to a stop at the crossing, was not contradicted. For reasons already given, in our judgment the case was properly submitted to the jury on the issue of contributory negligence. *Karr v. Milwaukee Light, etc., Co.*, *supra*; *Pittsburgh, etc., R. Co. v. Yundt* (1881), 78 Ind. 373, 41 Am. Rep. 580; *Warner v. Baltimore, etc., R. Co.*, *supra*; *Chicago, etc., R. Co. v. Ryan* (1897), 165 Ill. 88, 46 N. E. 208; *Cleveland, etc., R. Co. v. Lynn*, *supra*; *Chicago, etc., R. Co. v. Hedges* (1886), 105 Ind. 398, 7 N. E. 801; *Cadwallader v. Louisville, etc., R. Co.* (1891), 128 Ind. 518, 27 N. E. 161; 2 Thompson, Negligence §§1539 1613.

Certain instructions given by the court when interpreted in the light of our view of the theory of this case are somewhat short and inaccurate: Thus, by the first and seventh instructions given on the court's own motion, the court undertook to outline the theory and contents of the complaint. These instructions are short in their exposition of the proximate cause of the injury, as measured by the allegations of the complaint.

As we have indicated, appellant introduced evidence respecting the circumstances under which two short blasts of the whistle of an interurban electric car should

be sounded and the significance of such a signal.

7. Appellee thereupon, in rebuttal, introduced a witness, who, having testified to a number of years' experience as a locomotive engineer, and that he had had no experience in operating interurban electric cars, was permitted to testify as an expert over objection that when an engineer is driving a locomotive and train of cars in the night time, and observes in advance along the track a lighted match or burning paper, proper railroading requires that the whistle be sounded two short blasts, and that the locomotive and train be brought immediately to a standstill. The objection in substance challenged the qualifications of the witness to testify as an expert respecting the proper management of an interurban electric car, and challenged also the applicability of the evidence sought to the issues being tried. There was also an element of the objection that the hypothetical question propounded to the witness was not based on any of the facts or evidence in the case on trial. The witness was shown to have had sufficient experience and qualification to entitle him to be heard respecting the subject about which he was interrogated literally interpreted. That subject did not extend beyond the proper management of a locomotive engine under the circumstances indicated by the question. The management of an interurban electric car was not included. It would therefore seem on first view that the element of the objection that dealt with the qualification of the witness as an expert was not well taken. As the proper management of a locomotive engine was not involved in this action, it would also seem *prima facie* that, while the testimony complained of was erroneously admitted, it was immaterial. If

evidence is clearly immaterial, its erroneous ad-

8. mission is, as a general rule, held to be harmless.
St. Louis, etc., R. Co. v. Mathias (1875), 50 Ind.

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65; *Sparks v. Heritage* (1873), 45 Ind. 66; *Robinson v. Shanks* (1889), 118 Ind. 125, 20 N. E. 713; *Smith v. Meiser* (1894), 11 Ind. App. 468, 38 N. E. 1092; *Fralich v. Barlow* (1900), 25 Ind. App. 383, 58 N. E. 271; *McDermitt v. Hubanks* (1865), 25 Ind. 232; *Gregg v. Wooden* (1856), 7 Ind. 499; *Smith v. Mosier* (1838), 5 Blackf. 51; Elliott, App. Proc. §641. But if

testimony is directed to some issue, or to some

9. material question involved in the controversy, and its nature is such that it may have exercised some influence in determining such issue or question, its erroneous admission will be presumed to have been prejudicial, unless it otherwise affirmatively appears from the record. *Johnson v. Anderson* (1896), 143 Ind. 493, 42 N. E. 815; *Bellefontaine R. Co. v. Hunter* (1870), 33 Ind. 335, 5 Am. Rep. 201; *Pape v. Lathrop* (1897), 18 Ind. App. 633, 46 N. E. 154; *Barnett v. Leonard* (1879), 66 Ind. 422; Elliott, App. Proc. §632.

Notwithstanding such *prima facie* conclusion, a

7. more thorough consideration of the situation is convincing that the evidence was not only erroneously admitted, but also that a presumption of its prejudicial nature should be indulged, the following reasons being pertinent: First, the witness was not shown to be qualified to speak on the question involved in this case to which his testimony was evidently directed. Second, the evidence was offered on a theory not involved here, but it was of a nature calculated to have an unwarranted influence in determining the cause under its real theory. As to the first reason, a locomotive engine is a very different instrumentality from an electric traction car. They differ in motive power, manner of control, and in other respects. That the law recognizes such difference, see *Hughes v. Indiana Union Traction Co.* (1914), 57 Ind. App. 202, 105 N. E. 537. It follows that experience in operating a

locomotive engine does not necessarily, or even

10. presumptively, qualify a person to operate an interurban electric car, or to speak as an expert with reference to what good railroading re-
7. quires in operating the latter. While the testimony under consideration was literally directed to the question of the proper management of the former under assumed circumstances, it is plain that such testimony was intended to be effective in determining the question of the proper management of the latter, under the circumstances of this case. On this subject, not only was the witness not shown to be qualified to speak, but also the absence of qualification appeared affirmatively, in that it was disclosed that he had had no experience in the management of an interurban electric car.

As to the second reason, the negligence charged did not consist in the mere fact that the car being signaled did not stop at the crossing. There was no schedule requiring a limited car to stop at that place. It had not been appellant's custom to stop such a car there. Under ordinary circumstances, a prospective passenger might neither require nor expect it to stop, although signaled. Appellee does not claim that, had the car ignored the signal and continued its trip over the crossing, there would have been any negligence. The negligence as charged here consists in the fact that appellant caused such car, under the circumstances alleged, to assume an appearance at variance with its real nature, and that appellant thereupon failed to operate the car in harmony with its apparent nature. From its apparent nature, thus assumed, decedent was led to believe that, under the circumstances, the car would slow down and stop at the crossing. The fact that always, before the time involved here, a car approaching at that hour responded to the signal as did this car, and that it thereupon slowed down and stopped, induced such be-

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lief in decedent. Facts are alleged to the effect, and it is a fair inference from the evidence, that decedent was unable to ascertain that such belief was unfounded. As we have indicated, the motorman in charge knew the real facts respecting the nature of the car, and that he did not intend to make the stop. From the fact that the car was hailed, he should have known that there was in advance a person desiring to take passage, and who believed that the limited car was the local car then due. He did nothing, however, to remove such impression from the mind of such person. In fact he intensified such impression by giving such answering signal. The negligence charged, then, is not based upon the absolute duty to give an answering signal, and thereupon stop the car, and the failure to do so. It is based rather on the fact that, such answering signal having been given, the car was not stopped or slowed down. It thus appears that, if the jury found that the limited car assumed the appearance of the local car by answering the hail as the local car always did, a further question to be determined from proper evidence was whether the limited car should thereupon have slowed down and stopped. The question of whether there arose an obligation to stop the car under the circumstances was of controlling importance. The testimony under consideration was to the effect that a locomotive being signaled, as indicated, good railroading required the answer to the signal, and that the locomotive be stopped. That the locomotive should be stopped under the circumstances indicated is an important element of good railroading as defined by the witness. The tendency of the testimony was not only to confuse the jury and draw their minds from the real questions involved, but also to influence them to believe that an obligation to stop the car arose from the mere fact that it had been signaled. There could have been

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no purpose back of the introduction of the evidence other than so to influence the jury. The testimony was foreign to the theory of the complaint, and came from a witness not qualified to speak respecting the operation of an electric traction car. We cannot say that such testimony did not influence the jury. For error in admitting this testimony, the judgment must be reversed.

The death of the appellee having been suggested, the judgment is reversed as of the date of submission, with instructions to sustain the motion for a new trial.

ON PETITION FOR REHEARING.

CALDWELL, J.—In support of the petition for rehearing it is urged in behalf of appellee that this court erred in holding that the trial court improperly

11. admitted the testimony of the witness Kane, a locomotive engineer. Our decision in that respect is based on grounds as follows: That the witness was not shown to be competent to give an opinion as an expert on the subject to which his testimony was directed, namely, the proper management of an inter-urban electric car, and in fact that it affirmatively appeared that he was not qualified to speak on that subject, and that the evidence was offered and admitted apparently on a theory foreign to the issues being tried, but that its nature was such that its tendency was to influence the jury in determining the issues as presented by the pleadings. It is insisted in behalf of appellee that, even if it be conceded that the trial court erred in admitting such testimony, appellant is not in a position to avail itself of such error, for the reason that it first offered and introduced evidence of a like nature. Appellee appeals to the principle that where a party opens the door for the admission of incompetent evidence, he is in no position to complain that his ad-

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versary followed through the door thus opened and introduced like evidence. Appellee cites among other cases the following: *Perkins v. Hayward* (1890), 124 Ind. 445, 24 N. E. 1033, and *Lowe v. Ryan* (1884), 94 Ind. 450. Not doubting the soundness of the principle thus appealed to, we proceed to determine the extent that it is applicable and controlling here, if at all. The circumstances referred to by appellee as involving the introduction of improper and incompetent evidence by appellant, and as arousing such principle, are substantially as follows: Appellee in presenting his case in chief introduced evidence tending to show that the Summitville car, on being hailed as it approached Hiatt's crossing, always responded to such hail by two short blasts of the whistle, and that the car was then slowed down and brought to a stop at the crossing to receive as passengers the persons so hailing the car. It was averred in the complaint, in substance, that two short blasts of the whistle given in response to a hail signified that the car would stop. Appellee's case is predicated on decedent's right to reply on such manner of operating such car, and that any car so responding to a hail would be brought to a stop, but that the car involved here, although it so responded to the hail, did not slow down or stop. The complaint proceeds on the theory that the Summitville car was the only interurban car that stopped at Hiatt's crossing to receive passengers, and that it stopped only on hail. Appellee in his original brief so interprets the complaint, and he recognizes such as its theory in the brief filed on petition for a rehearing. Appellee's evidence in chief supports the complaint in this respect. There was no averment and appellee introduced no evidence that interurban cars other than the Summitville car did not also respond to a hail at this crossing by sounding two short blasts of the whistle; nor was there averment or evi-

dence introduced by appellee as to what knowledge decedent had as to the manner of operating other interurban cars in this respect at the crossing. Appellee then left it to conjecture as to whether all cars on being hailed when approaching the crossing responded by two short blasts of the whistle, and as to decedent's knowledge on that subject. Appellee's case then was planted on a custom that had been established respecting the operation of the local car and a failure to observe such custom, but appellee failed to establish that such custom was confined to local cars. If such custom was broader than was indicated by appellee's evidence, and if all cars when hailed on approaching the crossing responded to the hail by two short blasts of the whistle, and only cars thereupon slowed down and stopped, it is apparent that such fact would be important in determining the question of appellant's negligence and possibly also appellee's contributory negligence. Appellee's line of reasoning as applied to the entire case and stated syllogistically is as follows: Local cars approaching the crossing on being hailed answered by two short blasts of the whistle and thereupon slowed down and stopped, but limited cars did not stop at the crossing. The car involved here on being hailed responded by the two short blasts. Wherefore decedent believed and had a right to believe that the approaching car was a local car and that it would slow down and stop at the crossing. It will be observed that the minor premise is not fairly embraced by the major premise, and that as a consequence the conclusion does not inevitably follow. In order that the major premise might fairly comprehend the minor premise, the former should be to the effect that only local cars so responded or that limited cars did not so respond. Under such circumstances it seems apparent to us that it would have been entirely proper for appellant to introduce evidence that all cars,

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both local and limited, on being hailed responded by two short blasts of the whistle, but that only local cars thereupon slowed down and stopped, since thereby appellant would have rendered more evident the incongruity between the major and the minor premises of the syllogism as constructed. Appellant, under such circumstances, introduced testimony which appellee contends was erroneously heard, and which opened the door to the testimony of the witness Kane, the locomotive engineer. The facts are as follows: Appellant produced several witnesses who testified that they were engaged in operating interurban cars, some of them on the road involved here, and that they had had a number of years' experience in that line of work. They were then permitted to testify in effect that, a hail being observed as in the case at bar, proper operation required that the whistle be sounded two short blasts and, if the car were one that stopped at that place on hail, that it be brought to a stop; otherwise that it proceed; and also that as interurban electric cars, including appellant's cars, are operated, two short blasts of the whistle are merely an answer to any signal that the motorman may observe or hear, that they are not indicative of anything that the motorman intends to do; that they have no significance other than that the motorman has seen or heard the signal given to him. In view of the fact that appellee, in support of the contention that decedent was justified in believing that the approaching car was the Summitville car, introduced evidence that the limited car gave two short blasts of the whistle when the motorman observed a hail, and in view also of the allegations of the complaint to the effect that two short blasts of the whistle signified that the car would stop, it is our judgment that this evidence was properly heard. It, with the rules that were introduced, had a tendency to establish that it was the duty

of the motorman to sound the blasts under the circumstances regardless of the nature of the car, and consequently in explanation of why they were sounded on the occasion involved here, and such evidence also tended to meet the allegations of the complaint respecting the significance of the answering signal. It was under such circumstances that the court permitted the witness Kane, who had been a locomotive engineer on a steam railroad, but who had had no experience in operating interurban electric cars, and did not pretend to have any knowledge on that subject, to testify in effect that, had the road been a steam road, and had a locomotive rather than an electric car been approaching, good railroading would have required that when the hail was observed the whistle be sounded two short blasts, and that the locomotive be brought to a stop. This evidence could have been offered for no other purpose than to persuade the jury that like duties rested on the motorman of the electric car, regardless of whether the approaching car was a local or a limited car, and such is the effect reasonably to have been anticipated from its introduction. As we have said, it not only had not been shown that the witness Kane was competent to speak on the subject to which his testimony was intended to be and probably was applied by the jury, but the fact of such incompetency affirmatively appeared. Moreover, the state of the evidence did not call for rebuttal to the effect that any car, limited or local, under the circumstances, should have answered the hail by two short blasts of the whistle and then come to a stop. Appellee's complaint was not grounded on such theory. It has never been appellee's contention that it was the duty of the motorman of the limited car to respond to the hail and then stop the car. The complaint is predicated on the theory that the duty to stop the car grew out of the fact that the hail was answered.

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The state of the evidence called for rebuttal to the effect that only local cars that intended to stop when hailed should respond by two short blasts, and that such blasts had such significance. The duty to stop the car was a very important element in appellee's cause of action, and we, therefore, believe that the evidence of the witness Kane was improperly admitted, and that its admission was presumably prejudicial. We adhere to our ruling. It may be said that appellee in his original brief did not contend that the error, if any, in admitting the testimony of the witness Kane was not available to appellant or that the court did not err in admitting such evidence. In the original brief,

12. however, as in the brief in support of the petition for a rehearing, appellee contends that appellant's points on that subject are so general as not to present any question. Such points are somewhat general, but this court has no difficulty in ascertaining the ruling to which they are directed. Under such circumstances, it is the duty of this court to give them consideration.

Petition for rehearing is overruled.

NOTE.—Reported in 114 N. E. 478, 115 N. E. 101. Carriers: duty of, in respect to taking up passengers, 118 Am. St. 470.

CARTER ET AL. v. RICHART.

[No. 9,144. Filed November 21, 1919. Rehearing denied February 23, 1917. Transfer denied June 29, 1917.]

1. MASTER AND SERVANT.—*Contract to Employ Servant.—Action for Breach.—Complaint.—Sufficiency.*—In an action for breach of a contract of employment, a complaint alleging that plaintiff, while in the employment of defendants, was injured, that defendants, by their agent, in consideration of a written release executed by the employe, promised to pay plaintiff a stipulated sum of money and give him employment at the same wages he

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was receiving at the time of the injury, but failed to re-employ him though frequently requested to do so, and that plaintiff has been unable to obtain similar work, is sufficient as against demurrer for insufficiency of facts. p. 260.

2. **APPEAL.—Review.—Harmless Error.—Overruling Motion to Make Complaint More Specific.**—In an action for breach of a contract to employ plaintiff as part consideration for his release of claims for damages for personal injuries, although it would have been proper for the trial court to have sustained defendant's motion to make the complaint more specific by inserting therein the name of the person who acted as defendant's agent in making the alleged contract, the overruling of such motion was not prejudicial error where the record shows that before the institution of the suit defendants were fully advised as to who conducted the negotiations resulting in the settlement with plaintiff, that the agent reported the settlement to defendants shortly after he obtained the release, and that the release was produced by defendants at the trial and relied on as showing full payment of liability to plaintiff. pp. 260, 261.
3. **PLEADING.—Complaint.—Requisites.**—A complaint must state the cause of action in certain and direct terms, sufficient to fully inform the defendant of what he is called upon to meet, but need not elaborate details which are not essential to that end. p. 260.
4. **COSTS.—Payment.—Stay of Subsequent Proceedings.—Discretion of Trial Court.**—The refusal to stay proceedings, in an action for breach of a contract to employ plaintiff as part consideration for his release of claims for damages for personal injuries, until plaintiff paid the costs in a prior action for the injuries, was not an abuse of the trial court's discretion, the former suit being a different cause of action, since it was predicated on the right to recover for the injuries only. p. 262.
5. **COSTS.—Payment.—Stay of Subsequent Proceedings.—Discretion of Court.**—A stay of proceedings until the payment of costs in a former action generally relates to a second suit based on the same cause of action as a prior suit, and the stay cannot be obtained as a matter of absolute right, but the request therefor presents a question of sound judicial discretion to be exercised by the court in accordance with the facts and circumstances of each particular case. p. 262.
6. **PRINCIPAL AND AGENT.—Principal's Liability to Third Persons.—Agent's Authority.—Evidence.—Sufficiency.**—In an action against an employer for breach of a contract to employ plaintiff as a part consideration for his release of claims for personal injuries, evidence that defendants had a liability insurance policy and, in accordance with its provisions, notified

the insurer of the accident, that its agent negotiated a settlement with plaintiff for his injuries, obtaining a written release from him for all claims for damages on the promise that he would be re-employed, that the employer accepted the release and subsequently interposed it as a defense to plaintiff's action for his injuries, and that defendants, when informed by plaintiff that he was to be re-employed as a part consideration for the execution of the release, assured him that he would be given employment, was sufficient to warrant a finding by the jury that the insurer's agent had authority to represent defendants in making the settlement. pp. 263, 265.

7. **APPEAL.—Review.—Evidence.—Sufficiency.—Inferences from Facts Proved.**—Facts need not be proved by direct and positive evidence, since the court or jury may draw any reasonable inference of fact warranted by the evidence, and if a fact may be inferred from the facts and circumstances in evidence, it is sufficient on appeal. p. 265.
8. **CONTRACTS.—Contract of Employment.—Definiteness.**—A contract, in part consideration for the release of claims for personal injuries, to employ claimant at his old wages "as long as he was able to perform labor," there being evidence to show his average wage for several years, was sufficiently definite to make a valid and enforceable contract. p. 266.
9. **CONTRACTS.—Release.—Consideration.—Proof by Parol.**—The execution of a release for all claims for personal injuries in consideration of a specified sum of money does not preclude the claimant from showing the actual consideration for which the instrument was executed. p. 266.
10. **MASTER AND SERVANT.—Contract of Employment.—Action for Breach.—Instructions.**—In an action for breach of a contract of employment, given as part consideration for a release from claims for personal injuries, instructions that where one holds a contract to perform service and the other party wrongfully refuses to permit the services to be performed, it is the duty of the one who is to perform the services to seek similar employment elsewhere and thereby save himself harmless, if he is able to do so, and for a violation of such a contract, if he is unable to secure other employment during the term, the measure of damages is the wages stipulated during such period, but, if the injured party has been able to secure employment, the damages are the diminution between the wages agreed upon under the contract and those received in the new employment, that the jury should consider, in assessing damages, the kind of work at which the injured party had been engaged, and when, if at all, he has been able to perform the work he had

been engaged in since the injury, and any compensation received from other employment, and assess the recovery at any amount, not to exceed the sum demanded, as will fully compensate plaintiff, are proper. p. 266.

11. TRIAL.—*Instructions.*—*Necessity for Request.*—Where instructions as to the measure of damages for breach of a contract to employ plaintiff state the rule correctly in general terms, but failed to direct the jury to deduct interest from the amount allowed for wages to be earned in the future, the giving of the instructions is not reversible error in the absence of a tender of more specific instructions on the subject. p. 267.

From Marion Superior Court (89,689); *Joseph Collier*, Judge.

Action by William T. Richart against Frederick L. Carter and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

John B. Elam, James W. Fesler, Harvey J. Elam and Howard S. Young, for appellants.

White & Jones, for appellee.

FELT, J.—This is a suit for damages for the breach of an alleged contract for employment. Issues were formed by a complaint and an answer of general denial. A trial by jury resulted in a verdict for \$1,000. Appellants' motion for a new trial was overruled, and judgment rendered on the verdict.

Appellants have assigned as error: (1) The overruling of their motion to make the complaint more specific; (2) the overruling of the motion to stay proceedings until certain costs were paid; (3) the overruling of the demurrer to the complaint; and (4) the overruling of the motion for a new trial.

The complaint is in substance as follows: The appellants were partners doing business under the name of Carter, Lee and Company, and engaged in the manufacture of lumber, doors, sash and other materials, in the city of Indianapolis; that appellee was employed

by appellants to operate a rip saw run by electricity, and while so engaged on August 21, 1911, was injured by reason of appellants' negligent failure to properly guard the saw; that by reason thereof he lost one finger and two others were seriously injured; that at and prior to such injury he was earning and receiving \$15 per week for his labor; that on or about September 1, 1911, appellants recognized their liability for such injury, sent their agent to call upon him, and then and there promised and agreed to pay appellee in full settlement of the damages due him for said injury the sum of \$300, and further promised "to receive him back in their regular employment," or at such work as he had ability to perform, and pay him for such services the sum of \$15 per week "as long as he was able to perform labor"; that as a condition to such agreement appellants required appellee to execute a written instrument releasing them from all liability for damages resulting from said injury; that in pursuance of such agreement and release appellants paid him \$300 as a part of the consideration for said release; that the release was delivered to and accepted by appellants; that so soon as he had sufficiently recovered from his injuries to be able to work, he called upon appellants and notified them of that fact and that he was ready to go to work; that appellants refused to give him work, and have ever since refused to employ him, though frequently requested so to do; that when he so notified appellants, and continuously since that time, he was, and has continued to be, able to work, and ready and willing to continue in appellants' employment in pursuance of their agreement aforesaid; that he has performed all the conditions of said agreement by him to be performed, and has been continuously out of work since that time; that he has diligently sought, but has been unable to obtain, similar employment; that by reason

of appellants' violation of their agreement to give him employment he has suffered loss and has been damaged in the sum of \$10,000, for which he demands judgment.

Appellants assert that the complaint is insufficient because the averments do not show that the minds of the parties ever met on the material and essen-

1. tial features of the contract; that its provisions are too indefinite to constitute an enforceable contract. The complaint is clearly sufficient, under the decisions as against a demurrer for insufficiency of facts. *Pennsylvania Co. v. Dolan* (1892), 6 Ind. App. 109, 114, 32 N. E. 802, 51 Am. St. 289; *Indianapolis Union R. Co. v. Houlihan* (1901), 157 Ind. 494, 507, 60 N. E. 943, 54 L. R. A. 787; *Stewart v. Chicago, etc., R. Co.* (1895), 141 Ind. 55, 59, 40 N. E. 67; *Beatty v. Coble* (1895), 142 Ind. 329, 333, 41 N. E. 590; *Eisel v. Hayes* (1895), 141 Ind. 41, 43, 40 N. E. 11

Appellants also contend that the court committed reversible error in overruling their motion to make the complaint more specific by inserting the name of

2. the person who was the agent of appellants in making the alleged employment agreement. It would have been proper for the trial court to have sustained appellants' motion, but it does not necessarily follow that in overruling such motion the court committed reversible error. If no substantial injury results from the ruling, it is not prejudicial, though technically erroneous. The complaint must state the

3. cause of action in certain and direct terms, sufficient to fully inform the defendant of what he is called upon to meet, but need not go into an elaboration of details which are not essential to that end. *Elliott*, App. Proc. §665; *Pittsburgh, etc., R. Co. v. Simons* (1906), 168 Ind. 333, 339, 79 N. E. 911; *Alleman v. Wheeler* (1885), 101 Ind. 141, 143; *City of*

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Logansport v. Newby (1911), 49 Ind. App. 674, 677, 98 N. E. 4; *Lewis v. Albertson* (1899), 23 Ind. App. 147, 151, 53 N. E. 1071; *American Fire Ins. Co. v. Sisk* (1893), 9 Ind. App. 305, 309, 36 N. E. 659; *Indiana Stone Co. v. Stewart* (1893), 7 Ind. App. 563, 564, 34 N. E. 1019.

Furthermore, an examination of the whole record shows that before the institution of this suit appellants

were fully advised as to who conducted the negotiations which resulted in the settlement with appellee; that his name was Cherry and he reported the settlement to them and to the insurance company shortly after he obtained the release from appellee; that appellants received the release and set it up as a defense in a suit for damages for personal injuries brought against them by appellee and dismissed before this suit was begun; that Cherry was present at the trial of the case and testified as a witness; that appellants retained said release and relied upon it as showing full payment of their liability to appellee and as a complete defense to this suit; that there was no dispute in the evidence as to the identity of the person who made the settlement and obtained the release; and the questions involved were as fully and fairly tried out as they could have been had the motion been sustained and the amendment made in conformity with appellants' motion. In such situation, the ruling, if erroneous, was not prejudicial, and this court would not be warranted in reversing the judgment on account thereof. §§400, 407, 700 Burns 1914, §§390, 398, 658 R. S. 1881; *Shedd v. American Maize, etc., Co.* (1915), 60 Ind. App. 146, 108 N. E. 610, 615; *Chicago, etc., R. Co. v. Gorman* (1914), 58 Ind. App. 381, 391, 106 N. E. 897; *National, etc., Ins. Co. v. Wolfe* (1915), 59 Ind. App. 418, 425, 106 N. E. 390; *First Nat. Bank v. Ransford* (1913), 55 Ind. App. 663, 668, 104 N. E. 604.

Appellants also contend that the court committed reversible error in overruling their motion to stay proceedings in this case until appellee paid the costs

4. of another suit brought to recover damages for the injury to his hand while in appellants' employment which he had dismissed before commencing this action. This suit is for a breach of an alleged contract to employ appellee, and is therefore a different cause of action from that of the former suit. The trial court evidently concluded that this suit was brought in good faith; that it was not vexatious or without merit.

A stay of proceedings until the payment of costs

5. in a former action generally, if not universally, relates to a second suit based on the same cause of action as the former suit. In any event such stay cannot be obtained as a matter of absolute right, and the request therefor presents a question of sound judicial discretion to be exercised by the court in accordance with the facts and circumstances of each particular case.

Primarily the merits of the former case depended upon appellants' liability for the injury to appellee's hand. The merits of this case do not depend

4. upon that question, for this case proceeds on the theory that the parties had agreed upon a settlement for such liability and that appellants had violated the agreement by refusing to give appellee employment. These facts were necessarily before the trial court and we cannot say there was any abuse of discretion in refusing to stay the proceedings in this case. *Kitts v. Willison* (1883), 89 Ind. 95, 98; *Wait v. Westfall* (1903), 161 Ind. 648, 651, 68 N. E. 271; *Citizens Street R. Co. v. Shepherd* (1902), 29 Ind. App. 412, 414, 62 N. E. 300.

Under their motion for a new trial appellants pre-

sent the question of the sufficiency of the evidence and alleged error in giving and refusing certain instructions. It is asserted that there is no evidence from which the jury could infer that the person who made the settlement with appellee had any authority to promise him employment, or that appellants knew of such contract, or in any way ratified the same.

The evidence shows that appellants carried liability insurance in the General Accident, Fire and Life Insurance Corporation; that the policy issued to them,

6. among other things, provided that the insurance company should "defend in the name and on behalf of the assured, any suits, * * * brought against the assured to recover damages" for personal injuries; that the assured should give written notice with full information to the company, or its agent, and aid in effecting settlements of claims by securing information and furnishing evidence. The evidence also tends to show that appellee's accident was reported by appellants to the insurance company on a blank furnished for that purpose and that Charles E. Cherry, an agent of the insurance company, negotiated the settlement; that he procured from appellee a release as follows:

"Settlement in full of Claim for Personal Injury.

"I, William T. Richart, hereby admit and acknowledge that there has been paid to me in hand this day by Carter, Lee & Company the sum of three hundred and 00/100 dollars, in full settlement, accord and satisfaction of any and all claims or demands of every description which I now have or may hereafter have against the said Carter, Lee & Company on account of an accident causing an injury to me on or about August 21st 1911.

his
"William T. (X) Richart."
mark

Before bringing this suit appellee filed a suit against appellants for damages for the injury to his hand, and the foregoing release was set up as a defense to the action; that appellants had the same attorneys in both suits. The release was acknowledged before Cherry as notary public, and he testified that the signature on the back of the release was his; that he reported the settlement to Carter, Lee and Company, and told them Richart was asking for his job back. Appellee testified that he went to appellant's mill and told Mr. Carter that the insurance company had seen him and he had signed a release for \$300, and was to take that amount and get his job back, and Mr. Carter said, "Certainly you will"; that he told Carter that Cherry promised him his job back and Mr. Carter replied, "Your job will be all right." Appellant Lee testified that he talked with Mr. Cherry about the settlement a day or so before he went out to see Richart; that he learned of the settlement a day or two after it was made, but did not authorize Mr. Cherry to promise employment to appellee. Appellee and several other witnesses testified in substance that Mr. Cherry promised appellee he was to have "the same job at the same money" as soon as he was able to work, and said he had authority from Carter, Lee and Company to make that arrangement; that appellee would not sign the release without assurance that he was to be employed by appellants at the same wages as soon as he was able to work and was to continue as long as he was able to work, and that Cherry agreed thereto. The evidence also tends to show that just prior to his injury appellee was receiving twenty-five cents per hour and working ten hours per day, and that his average wages for many years had amounted to twenty-five cents per hour or more.

Facts need not be proved by direct and positive evi-

dence, and the court or jury trying the case may draw any reasonable inference of fact warranted by

7. the evidence. If a fact may reasonably be inferred from the facts and circumstances which the evidence tends to establish, it is sufficient on appeal. *Bronnenberg v. Indiana Union Traction Co.* (1915), 59 Ind. App. 495, 109 N. E. 784; *Hedrick v. D. M. Osborne & Co.* (1884), 99 Ind. 143, 147. The evidence is sufficient to warrant the jury in find-

6. ing that Cherry had authority to make settlement for both the insurance company and appellants. The release was executed to appellants, and was accepted, retained and relied upon by them. Authority to make the settlement necessarily included the power to agree upon the consideration appellee was to receive for executing the release.

It is not disputed that appellants accepted, and retain and rely upon, the release obtained by Cherry from appellee. In a case quite similar to the one at bar it has been decided that where an employer accepts such release he thereby elects to affirm the settlement as made, and cannot affirm the part beneficial to him and reject the rest. Appellants do not dispute the fact of such decision, but contend that it is bad law and should not be followed. Having concluded that there is some evidence to warrant the jury in inferring that appellants authorized Cherry to make the settlement, the decision in this case does not rest wholly upon the foregoing proposition. We observe, however, that the Supreme Court denied a transfer of the case, and this in effect makes it the decision of that court as well as this. *American Car, etc., Co. v. Smock* (1911), 48 Ind. App. 359, 362, 91 N. E. 749, 93 N. E. 78; *Usher v. New York, etc., R. Co.* (1902), 76 App. Div. 422, 78 N. Y. Supp. 508; *Id.* (1904), 179 N. Y. 544, 71 N. E. 1141. The

terms of the alleged employment were sufficiently definite to make a valid and enforceable contract. By executing the release appellee was not precluded from showing the actual consideration for which it was executed. *Pennsylvania Co. v. Dolan, supra; American Car, etc., Co. v. Smock, supra; Stewart v. Chicago, etc., R. Co., supra; Cox v. Baltimore, etc., R. Co.* (1913), 180 Ind. 495, 505, 103 N. E. 337, 50 L. R. A. (N. S.) 453.

Appellants complain of the fifth and thirteenth instructions given to the jury, which are as follows: "5.

Where one holds a contract to perform service
10. and the other party wrongfully refuses to permit the services to be performed, it is the duty of the one who is to perform the services to seek similar employment elsewhere and thereby save himself harmless, if he is reasonably able to do so. And so for a violation of such a contract the measure of damages is the wages stipulated for the full term, where the injured has been unable to secure other employment during the term. And where the injured party has been able to secure employment then the measure of damages is the diminution between the wages agreed to be paid under the contract and the wages received under the new employment. So in this case if you find that the contract existed between plaintiff and defendants as charged and that defendants wrongfully violated it as charged, then under such circumstances it was the duty of plaintiff to seek other employment. * * * 13. If under the evidence and these instructions you find for plaintiff it will then be your duty to determine and assess the damages, if any. In that connection you may consider, only however, as may be shown by the evidence the following elements viz.; the kind of work at which he was engaged before and at the time of his alleged injury and the wages, if any, paid him therefor. When, if

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at all, he has been able and willing, since his alleged injury, to perform the work he was engaged in when injured, and what if any period of time since the alleged injury he has been unable to secure employment of the class at which he was engaged when injured. Also you may consider what if any other employment, he has had since his alleged injury, and the wages he has received therefor, if any. And from a consideration of the elements enumerated, only as may be shown by a preponderance of the evidence, you may assess the recovery at such an amount as will fully compensate plaintiff for the damages, if any, he has sustained, as alleged in the complaint, but not to exceed the sum demanded therein."

The instructions state the rule for the measure of damages in cases like the one under consideration substantially as declared in the decisions of both this court and our Supreme Court. *Pennsylvania Co. v. Dolan*, *supra*, 121; *Inland Steel Co. v. Harris* (1911), 49 Ind. App. 157, 163, 95 N. E. 271; *Hinchcliffe v. Koontz* (1890), 121 Ind. 422, 426, 23 N. E. 271, 16 Am. St. 403; *Hamilton v. Love* (1899), 152 Ind. 641, 647, 53 N. E. 181, 54 N. E. 437, 71 Am. St. 384.

Appellants also contend that the instructions on the measure of damages are erroneous because they did not direct the jury to deduct interest from the

11. amount allowed for wages to be earned in the future. The authorities do not generally take into account the question of interest in stating the rule for the measure of damages. But if correct in their contention, which we do not decide, appellants have not shown reversible error. The instructions state the rule correctly in general terms, and if appellants desired a more specific instruction as to the items that should be deducted in arriving at the amount of the verdict, it was their duty to have tendered a proper instruction

on the subject, and failing to do so, cannot be heard to complain of those given. *Malott v. Shimer* (1899), 153 Ind. 35, 42, 54 N. E. 101, 74 Am. St. 278; *National Fire, etc., Co. v. Smith* (1913), 55 Ind. App. 124, 145, 99 N. E. 829; *McAfee v. Montgomery* (1898), 21 Ind. App. 196, 203, 51 N. E. 957. The instructions given, when considered in their entirety, fairly and accurately state the law applicable to the issues and evidence of the case.

The case seems to have been fairly tried on its merits and a correct result reached. No intervening error has been pointed out which would warrant a reversal of the judgment.

Judgment affirmed.

NOTE.—Reported in 114 N. E. 110. Validity of contracts for permanent employment, 35 L. R. A. 515; 50 L. R. A. (N. S.) 455.

INDIANA MANUFACTURING COMPANY v. COUGHLIN, ADMINISTRATOR.

[No. 9,148. Filed February 14, 1917. Rehearing denied June 1, 1917. Transfer denied June 29, 1917.]

1. APPEAL.—*Review.—Reversible Error.—Overruling Motion to Make More Specific.*—Section 343a Burns 1914, Acts 1913 p. 850, providing that any conclusion stated in any pleading must be considered and held to be equivalent to an allegation of all the facts required to sustain such conclusion when the same is necessary to the sufficiency of the pleading, subject to the right of the party affected thereby to move that the facts be stated, and, if the facts upon which material conclusions are based do not sufficiently appear from the pleading when read in its entirety, the overruling of a motion to make the pleading state them will constitute prejudicial and reversible error. p. 276.
2. PLEADING.—*Complaint.—Pleading Conclusions.*—In an action for the death of a servant caused by a defective coupling on a line shaft in defendant's factory, a conclusion in the complaint "that in the course of said employment and in compli-

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ance with instructions given by said defendant corporation to said decedent, said decedent was, on said day, engaged in putting up a system of telephone wire in defendant's said factory" was sufficiently supported by averments of fact that defendant directed that the wire be placed on the joists and ceiling of the factory room through a course along the line shaft within a space of approximately two feet over the shaft coupling, and that the employment, so directed, brought decedent alongside of and over the alleged defective coupling. p. 276.

3. **PLEADING.—Complaint.—Pleading Conclusions.**—In an action for the death of a servant caused by a defective coupling on a line shaft in defendant's factory, conclusions in the complaint "that to comply with the orders and directions of said defendant then and there given to decedent it was necessary for said decedent to and he did go close alongside of and over said shaft coupling," and "that said unguarded shaft coupling was at a place where workmen of said defendant, including decedent, were, at the time of the placing of said telephone wires, required to go," were, in so far as they were material, sufficiently supported by averments of fact that defendant directed that the wire be placed on the joists and ceiling of the factory room along the line shaft approximately two feet over a rapidly revolving shaft coupling which defendant had negligently failed to guard, and that the employment, as directed by defendant, brought the decedent alongside and over the coupling. p. 276.
4. **PLEADING.—Complaint.—Pleading Conclusions.**—In an action for the death of a factory employe caught by a defective coupling on a line shaft while engaged in the installation of a telephone system, a complaint based on the Employers' Liability Act (§§8020a-8020k Burns 1914, Acts 1911 p. 145), meets the requirements of the act by alleging facts showing that decedent was ordered by his employer to work at a place made dangerous by its negligence, and while performing such work as ordered and by reason of conformance to the order, decedent received the injury causing his death, and any averment, by way of conclusion, with reference to other employes being required to work at such place was not essential to the sufficiency of the pleading, and conclusions in the complaint that a coupling on a line shaft "was unguarded so as to protect from injury the employes of defendant corporation who worked about the same" and "that in the course of said employment and in pursuance to the instructions of said defendant, decedent was on said day engaged in putting up a system of telephone wires in defendant's said factory in the vicinity of said shaft coupling," were sufficiently supported by averments of fact showing the character of the work which defendant required

of decedent, the nature of the order and directions given to decedent by defendant, that in conforming to such order and directions decedent was required to be and was, in fact, brought in close proximity to the coupling, and that the coupling was unguarded and was in motion when decedent was directed to do the work which brought him in contact with it. p. 277.

5. PLEADING.—*Complaint.—Pleading Conclusions.*—In an action for the death of a factory employe based on the Employer's Liability Act (§§8020a-8020k Burns 1914, Acts 1911 p. 145), a conclusion in the complaint "that said injury to said decedent was caused directly by the obedience of said decedent to the order of" a foreman, was sufficiently supported by averments of fact that defendant's foreman had charge of the work and that he ordered decedent to place a line of telephone wire on the joists and ceiling of a factory room across a line shaft and over an unguarded shaft coupling, which was revolving at a high rate of speed, and that in conforming to such order decedent was caught by the coupling and received the injury resulting in death. p. 278.
6. PLEADING.—*Theory.—Sufficiency.*—Where a theory of a pleading has been adopted by the parties, its sufficiency must be determined on appeal upon that theory. p. 278.
7. MASTER AND SERVANT.—*Injuries to Servant.—Factory Act.—Construction.—Dangerous Machinery.—Guards.*—The provisions of §9 of the Factory Act, §8029 Burns 1914, Acts 1899 p. 231, 234, requiring dangerous machinery to be guarded, should receive from the courts an interpretation and construction which will carry out the statute's evident purpose to protect those who work around dangerous machinery from injury therefrom, and not to impose unreasonable requirements or onerous and unnecessary burdens on the factory owner. p. 279.
8. MASTER AND SERVANT.—*Injuries to Servant.—Factory Act.—Scope.—Dangerous Machinery.—Guards.*—Section 9 of the Factory Act, §8029 Burns 1914, Acts 1899 p. 231, 233, requiring that dangerous machinery be guarded, while not intended to impose upon the factory owner unreasonable burdens, so as to require him to guard his laborers against every possible danger, extends protection to all laborers in factories using dangerous machinery, regardless of the number exposed, or the character of the work which exposes them to the danger, and where a factory employe was injured by an unguarded coupling while installing a system of telephone wires over a line shaft under the orders and direction of the master, it was the employer's duty under the statute to guard such coupling, and the failure to do so was negligence, although it was the first occasion upon

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which any employe had been brought in dangerous proximity to the coupling. p. 279.

9. **MASTER AND SERVANT.—Injury to Servant.—Action.—Factory Act.—Guarding Dangerous Machinery.—Complaint.**—In an action for the death of a factory employe predicated on §9 of the Factory Act, §8029 Burns 1914, Acts 1899 p. 231, 233, requiring dangerous machinery to be guarded, the duty to guard machinery must be determined in relation to, and in the light of, all the averments in the complaint showing the employment and duties of the particular person invoking the protection of the statute at the time he received his injury. p. 281.
10. **MASTER AND SERVANT.—Injuries to Servant.—Action.—Complaint.—Sufficiency.**—In an action for the death of a factory employe caused by an unguarded shaft coupling, allegations in the complaint that during the time decedent was employed by defendant and subject to the orders and direction of his foreman, and at a time when the unguarded shaft coupling was open and exposed and was being revolved by defendant with force and speed, the foreman carelessly and negligently ordered decedent to place a telephone wire on the joists and ceiling of the factory room across the line shaft and over the coupling, sufficiently show, when aided by permissible inferences, that decedent was directed to place the wire over the shaft coupling while it was in motion. p. 282.
11. **APPEAL.—Briefs.—Sufficiency.**—Where appellant's brief, in its points and authorities, states several general propositions of law without indicating to what particular ground of the motion for new trial it desires to apply them, as required by Rule 22 of the Appellate Court, only such of these propositions as by their wording indicate to what particular ground of the motion they were intended to apply will be considered. p. 283.
12. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—In an action for the death of a factory employe caused by an unguarded shaft coupling, error, if any, in the admission of evidence that after decedent's injury the shaft coupling and shaft were boxed and that such protection did not interfere with the running of the line shaft machinery, was rendered harmless by an instruction that such testimony was "no evidence or admission of any negligence on the part of defendant." p. 284.
13. **DEATH.—Negligent Death.—Measure of Damages.—Instructions.**—In an action for wrongful death, an instruction that the jury might consider, in determining the amount of damages, whether decedent's parents would probably have received from him such personal attention and services as are usually rendered by a son living with his parents, taking into considera-

tion all the evidence bearing on decedent's character, habits, disposition, conduct, love for his parents and all other facts and circumstances in evidence enabling the jury to decide the pecuniary loss suffered by the father and mother, and that the verdict should compensate them for their pecuniary loss, is not erroneous as permitting the jury to go outside the evidence or as allowing them to consider improper elements of damage. p. 285.

14. APPEAL.—*Briefs.*—*Sufficiency.*—*Waiver of Error.*—Error in the giving or refusal of instructions is waived where not presented under the points and authorities in appellant's brief. p. 286.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by William H. Coughlin, administrator of the estate of Leo Coughlin, deceased, against the Indiana Manufacturing Company, Elbert W. Shirk, receiver. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Albert H. Cole and *Charles A. Cole*, for appellant.

Jabez T. Cox and *Claude Y. Andrews*, for appellee.

HOTTEL, J.—This is an appeal from a judgment of the Miami Circuit Court in appellee's favor for \$2,500, in an action brought against appellant to recover damages for the death of Leo Coughlin. On and prior to November 8, 1912, the time of the occurrence complained of, the Indiana Manufacturing Company was a corporation which employed more than five men, among whom was appellee's decedent, Leo Coughlin, and, on said day, he and others were engaged in installing a telephone system in appellant's factory. While engaged in such work, attempting to pass one of the wires of said system over a pipe some ten or twelve feet above the floor of said factory, decedent came in contact with a coupling of appellant's metal line shaft that was being rapidly revolved, and he thereby received injuries which resulted in his death.

The complaint is in two paragraphs, to each of which

appellant filed a separate motion to require appellee to state the facts necessary to sustain certain conclusions stated therein and indicated in such motion. These motions were overruled. A demurrer addressed to each paragraph of the complaint and a motion for new trial, filed by appellant, were likewise overruled. These several rulings are respectively challenged by appellant's assignments of error, and are relied on for reversal.

The averments common to each of the paragraphs, and necessary to an understanding and disposition of the questions presented by the rulings, *supra*, are in substance as follows: Appellant, for the purpose of transmitting power to its machinery, maintained in its factory a metal line shaft about forty feet long and three inches in diameter. Said shaft was in sections, which were joined together by a certain coupling consisting of two metal discs eight inches in diameter, held together by four bolts extending through the faces of said discs and within one inch from the periphery thereof. Said sections of shaft when thus coupled together formed a continuous shaft. The nuts, and the thread ends of said bolts extending beyond said nuts, projected from the faces of said coupling about two inches. At said times said shafting and coupling could have been guarded so as to protect from injury the employes of defendant who worked about the same, without interfering with the efficient use for which they were designed and used by defendant.

The first paragraph then proceeds in substance as follows: Decedent, on said day, and for some weeks prior thereto, "had been employed by and was working for defendant at said factory; *that, in the course of said employment and in compliance with instructions given by said defendant corporation to * * * said decedent, said decedent was, on said day, engaged in putting up*

*a system of telephone wire in defendant's said factory; that said defendant directed that said wire be placed on the joists and ceiling of said factory room through a course along said line shaft within a space of approximately two feet over said shaft coupling; that said employment, so directed brought * * * decedent alongside of and over said coupling; that to comply with the orders and directions of said defendant then and there given to * * * decedent it was necessary for said decedent to and he did go close alongside of and over said shaft coupling;"* that, while decedent was so employed, and in close proximity with said shaft, defendant caused said shaft and coupling to revolve with great force and speed, viz., 100 horse power, at 200 revolutions per minute; that while decedent was so employed, there was a defect in said machinery and in said coupling, which was known to defendant, to wit, the absence of a guard over said coupling; that defendant had neglected and failed to place and maintain any guard thereover; that said shaft and coupling were at the time in question unguarded; *"that said unguarded shaft coupling was at a place where workmen of said defendant, including * * * decedent, were, at the time of the placing of said telephone wires, required to go;"* that in consequence of said defect and of the negligence of defendant in failing to guard said coupling, decedent, on said day and while in the employ of defendant, was injured by coming in contact in the manner aforesaid with said shafting and coupling, etc., from which injuries he died.

The second paragraph, in addition to the averments common to each paragraph, indicated *supra*, avers that said coupling *"was unguarded so as to protect from injury the employes of defendant corporation who worked about the same;"* that decedent was on November 8, 1912, and for some months prior thereto had been, in

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the employ of defendant corporation at said factory; *“that in the course of said employment and in pursuance to the instructions of said defendant, * * * decedent was on said day engaged in putting up a system of telephone wires in defendant’s said factory in the vicinity of said shaft coupling;”* that in said work defendant corporation employed one Benedict, who had charge of the construction of said telephone system with authority from said defendant to give orders and directions as to the placing of the wire; that decedent, while engaged as aforesaid, was subject to the order and direction of said Benedict in the construction of said telephone system at the time of the injury; that, when said coupling was being revolved by defendant with great force and speed, in the exposed and unguarded condition aforesaid, *“said Benedict carelessly and negligently ordered and directed * * * decedent and others with whom he was working to place a line of telephone wire on the joists and ceiling of said factory room from the westward to the eastward side of said room and thence southward across said line shaft and over said shaft coupling; that decedent complied with said order and proceeded with the execution of said work as ordered and in so doing his body was brought close alongside of and over said exposed shaft coupling when the same was in motion and speed”* and injured, etc.; *“that said injury to said decedent was caused directly by the obedience of said decedent to the order of said Benedict.”* (Our italics.)

The portions of each paragraph of the complaint which we have italicized, *supra*, are attacked by appellant’s said motions as being conclusions, which should have been supplemented by an averment of the facts necessary to their support. It is insisted in effect that inasmuch as the courts have always jealously guarded the right of a defendant to be apprised of the

facts relied on as establishing liability against him, and inasmuch as the legislature, by the act of March 15, 1913, (§343a Burns 1914, Acts 1913 p. 850) makes any conclusions found in a pleading the equivalent of a statement of the facts upon which it is based, subject only to the right of the party affected thereby, by written motion to have such facts stated, that the overruling of such a motion is necessarily a harmful and prejudicial error.

Generally speaking, appellant's contention is correct. However, in this connection, it should be remembered

that it is only those conclusions which are "nec-

1. essary to the sufficiency of the pleading" that are affected by said act. As to such conclusions, if the facts upon which they are based do not sufficiently appear from the pleading when read in its entirety, the overruling of a motion to make the pleading state them will constitute prejudicial and reversible error. *Premier Motor Mfg. Co. v. Tilford* (1915), 61 Ind. App. 164, 111 N. E. 645, 647; *S. W. Little Coal Co. v. O'Brien* (1916), 63 Ind. App. 504, 113 N. E. 465.

In its said motion, appellant states as grounds therefor that to support the conclusions involved in the first italicized averment of the first paragraph, *supra*,

2. the facts showing the nature of the employment and the instructions therein referred to should have been stated. Granting this to be true, *such facts* appear in the averment which immediately follows (quoted *supra*). So with the second and third

3. italicized portions of the first paragraph, *supra*, if regarded as conclusions, they, in so far as they are essential to the sufficiency of such paragraph, are justified by the other *facts averred* in such pleading.

It is charged in said motion against the language of the second paragraph first italicized, *supra*, that to sustain such conclusions it was necessary to allege facts

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showing that employes of appellant worked about
4. the shaft coupling referred to, the class of employes who did such work, and the nature of the work they were performing when about such shaft coupling.

The requirements of the statute upon which this paragraph is based (§§8020a-8020k Burns 1914, Acts 1911 p. 145) were met by alleging facts showing that decedent was ordered by appellant to work at a place made dangerous by its negligence, and that while performing such work in obedience to such order and by reason of such conformance thereto, decedent received the injury that resulted in his death, and any averment, by way of conclusion or otherwise, with reference to other employes being required to work at such place was not essential to the sufficiency of the pleading.

It will be observed that said paragraph alleges *the facts* showing the character of the work which *appellant required of decedent, the nature of the order and directions given to decedent by appellant*, and that conforming to such order and directions *decedent was required to be, and was in fact, brought in close proximity to said coupling of said line shaft*; that such coupling was unguarded and *was in motion when decedent was directed to do the work which brought him in contact with it*; that while obeying such orders and directions and because thereof decedent was caught by said coupling, etc. Said paragraph therefore contains *averments of all the facts* indicated as necessary by appellant's said motion to support said conclusions, except those showing the necessity for other employes of appellant to work near said coupling and the character of the work required of such employes, and, as before indicated, such conclusion, in so far as it involves such facts, is not essential to the sufficiency of said pleading.

As grounds for said motion, in so far as it affects the

conclusion involved in the last italicized portion of said paragraph, quoted *supra*, appellant states that

5. such conclusion should be supported by facts showing the nature of the order and directions given by Benedict, what decedent did in obedience thereto, etc. These facts sufficiently appear from the averments which precede said conclusion. The grounds of said motion affecting the other italicized portions of this paragraph are not substantially different from those discussed in the first paragraph, and hence need not be repeated. No error resulted from the ruling of the trial court on said motions.

We next address ourselves to the third error assigned. It is contended by appellant and conceded by appellee that the first paragraph of complaint proceeds

6. on the theory that the appellant was negligent in violating a duty to guard the coupling in controversy, imposed upon it by the provisions of the Factory Act, §8029 Burns 1914, Acts 1899 p. 231, 234. Upon this theory, therefore, the sufficiency of said paragraph must be determined. *Euler v. Euler* (1913), 55 Ind. App. 547, 553, 102 N. E. 856, and cases there cited.

Appellant also concedes that the sole question presented by such assignment of error is whether "*under the provisions of the factory act appellant owed to appellee's decedent a duty to guard the coupling in question.*" It is insisted by appellant, in effect, that such act does not require an employer to guard every piece of machinery, even of the kind particularly described therein, but that the terms of the act are complied with when such employer guards the machinery designated therein when its location is such that the employes of such factory, in the usual discharge of their labors and duties, may be brought in close proximity to such machinery when in motion; that the facts averred in said

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paragraph show that the coupling in question was eight feet above the floor, completely out of reach of the employes working in and around said factory and the machinery therein, that the "*only employment that ever brought any employe into dangerous proximity to the coupling was on the occasion when plaintiff's decedent was installing telephone wires on the ceiling.*"

The italicized words just quoted from appellant's brief state the facts more favorable to its contention than the averments of said paragraph of complaint warrant. However, assuming that such is the effect of the averments of said paragraph, we believe it sufficient when considered in its entirety. It is true, as appellant contends, that the statute in question should

7. receive from the courts an interpretation and construction which will carry out its evident purpose, and that such statute "was intended to protect those who worked around dangerous machinery from injury therefrom, and not to impose unreasonable requirements or onerous and unnecessary burdens upon the owner of the factory." *Pinnell v. Cutsinger* (1909), 44 Ind. App. 419, 423, 424, 89 N. E. 493, 495.

However, the protection of said act is extended to all *laborers* in factories using such machinery, regardless of the number exposed, or the character of the

8. work which exposes them to such danger. Upon this question, this court, in the case of *F. Bimel Co. v. Harter* (1912), 51 Ind. App. 267, at page 276, 98 N. E. 360, 363, said: "The evident intention of the legislature in passing the factory act was *to protect*, so far as it may reasonably be done, *all laborers* in factories using dangerous machinery about which laborers are required to go in doing the work required of them.

* * * By reason of that act *the only necessary requisite* for guarding it (a set screw) *was that some*

laborer was required to go about it in doing his work." (Our italics.) See, also, *Watt v. Mishawaka Paper, etc., Co.* (1913), 53 Ind. App. 682, 99 N. E. 1029.

It is true, as appellant contends, that it was not intended by the statute in question to impose upon the factory owner unreasonable burdens, or to require that he guard his laborers against every possible danger (*Robertson v. Ford* [1904], 164 Ind. 538, 74 N. E. 1; *Glens Falls, etc., Cement Co. v. Travelers' Ins. Co.* [1900], 162 N. Y. 399, 56 N. E. 897; *Cobb v. Welcher* (1894), 75 Hun 283, 26 N. Y. Supp. 1068); but this principle and line of cases have no application where, as in the instant case, it appears that the machinery in question is of the kind required by the statute to be guarded, that there was a total failure to guard it, and that the master, knowing its unguarded condition, required its employe to work at a place where he would be exposed to the danger of such unguarded machinery while it was being operated. In such a case, the statute makes imperative the duty to guard, and a failure to do so is negligence. *Robbins v. Ft. Wayne Iron, etc., Co.* (1907), 41 Ind. App. 557, 563, 84 N. E. 514; *F. Bimel Co. v. Harter, supra*; *United States Cement Co. v. Cooper* (1909), 172 Ind. 599, 612, 88 N. E. 69; *Cincinnati, etc., R. Co. v. Armuth* (1913), 180 Ind. 673, 677, 679, 103 N. E. 738.

We are aware that there are cases in other jurisdictions which lend support to appellant's contention, notably *Glens Falls, etc., Cement Co. v. Travelers' Ins. Co., supra*; *Cobb v. Welcher, supra*; *Dillon v. National Coal Tar Co.* (1905), 181 N. Y. 215, 73 N. E. 978; *Shaw v. Union Bag, etc., Co.* (1902), 76 App. Div. 296, 79 N. Y. Supp. 276, 277, 278; *Glassheim v. New York, etc., Printing Co.* (1895), 13 Misc. Rep. 174, 34 N. Y. Supp. 69, 72. Other New York cases, however, indicate a more liberal construction of such statute.

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Hartman v. Berlin, etc., Co. (1911), 71 Misc. Rep. 30, 127 N. Y. Supp. 187; *Walker v. Newton Falls Paper Co.* (1904), 99 App. Div. 47, 90 N. Y. Supp. 530. It seems from some of the New York cases that the court justified its limitation of the protection of the act involved in the particular case to "employees required to work about machinery in motion" on the ground that the title of the act being construed indicated an intention on the part of the legislature to so restrict its application. This is true with reference to the act of 1897, New York Laws 1897, chapter 415, §81. *Shaw v. Union Bag, etc., Co., supra.* This reason could not operate in construing the Indiana statute, because the title of the Indiana act, instead of indicating any intention to restrict the protection of the act to any particular class of employees, shows an intention to extend its protection to all laborers exposed to the dangers of such machinery. Acts 1899, ch. 142, p. 231, *supra*, entitled "An Act concerning labor, and providing means for protecting the liberty, safety and health of laborers, etc." However, whatever may have been the reasons for the restricted interpretation, indicated by the New York cases cited *supra*, such interpretation has not received the approval of the courts of appeal of this state, and the great weight of authority in other jurisdictions favors the liberal construction adopted by our courts. 5 Labatt, Master and Servant (2d ed.) 5672, 5673, §1856, and cases there cited.

If this were an action by an employe of appellant whose employment required him to be on the floor of appellant's factory, the duty to guard in favor of

9. such employe would not be shown by the averments in question, but the duty to guard under the statute must be determined in relation to and in the light of all the averments of the pleading showing the employment and duties of the particular per-

son invoking the protection of the statute at the time he received his injury. As was said by this court in the case of *H. A. McCowen & Co. v. Gorman* (1912), 51 Ind. App. 523, 100 N. E. 31: "If, as contended by appellant, the shaft was eight feet above the floor, *and decedent was not required to be nearer it than the floor, in the performance of his work*, then the cases of *Robertson v. Ford*, *supra*, and *Grace v. Globe Stove, etc., Co.* (1907), 40 Ind. App. 326, 82 N. E. 99, would be in point," (our italics) but the averments of the complaint in question show that at the time appellee's *decedent* was injured *he was required by appellant to perform work which took him in close proximity to said coupling*, and hence he was entitled to the protection of said statute.

In addition to the objection urged against the first paragraph above discussed and determined, appellant insists, in support of his fourth assigned error, 10. *supra*, that the alleged negligent order relied on in the second paragraph of complaint did not direct decedent to place the telephone wire over the shaft coupling while it was in motion.

Assuming, without deciding, that the averments of said paragraph may be open to the interpretation insisted on by appellant, yet their fair and reasonable interpretation at least permits the inference that Benedict ordered said decedent to place said wire over said shaft *while it was in motion*. This interpretation is, we think, justified by the following averments, which follow those showing decedent's duty to obey the orders of Benedict, viz.: "Plaintiff avers that *during the time his decedent was employed by defendant corporation and subject to the orders and directions of said Benedict as aforesaid, and at a time when said shaft coupling, in the condition aforesaid, was open and exposed and was being revolved by defendant with force and*

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speed as aforesaid, *said Benedict carelessly and negligently ordered and directed plaintiff's decedent, and others with whom he was working, to place the telephone wire on the joists and ceiling of said factory room from the westward to the eastward side of said room and thence southward across said line shaft and over said shaft coupling.*" Under the more recent decisions of the Supreme Court and this court inferences which may be reasonably and fairly drawn from the facts well pleaded may be indulged in favor of a pleading. *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99. For the reasons indicated, we are of the opinion that no error resulted from the rulings on said demurrers.

In its brief under its points and authorities, and under the heading "Fifth Assignment of Error," appellant states several general propositions of law

11. without indicating to what particular ground of the motion for new trial it desires to apply them. This is not a compliance with Rule 22 of this court, and only such of these propositions as by their wording indicate to what particular ground of the motion they were intended to apply will be considered by the court. In so far as such propositions may apply to that ground of the motion which challenges the sufficiency of the evidence, they present substantially the same questions that we have considered and determined in our discussion of the sufficiency of the complaint, and hence need not be further discussed.

By its twenty-sixth proposition, appellant says that "it is error to admit evidence that after an accident defendant had placed guards on the machinery"; that such evidence is incompetent either for the purpose of showing negligence, or for the purpose of showing that such machinery could be guarded without impairing its usefulness. This proposition is evidently intended to

apply to that ground of appellant's motion for new trial which challenged the action of the trial court in admitting the following evidence, viz.: L. D. Zook, a witness for appellee, was asked whether he saw "this same coupling and the line shafting in operation while it was boxed after the injury of Leo Coughlin" to which the witness responded, "Yes sir, I did." This was followed by another question which elicited the answer that "it did not interfere with the running of the line shaft machinery at all."

It is contended by appellee that this ruling of the trial court is not properly saved and presented for our consideration, but assuming without deciding

12. that it is, we are of the opinion that any error involved in the admission of such evidence which might have been prejudicial to appellant was rendered harmless by an instruction given by the court, in which the jury was told that such evidence was "no evidence or admission of any negligence on the part of defendant."

The only other possible effect the evidence could have had, was its effect on the question whether such machinery could be guarded without interfering with the use of the machine, and this was not a controverted question in the case. There was no evidence and no claim that it could not be so guarded. The Supreme Court in the case of *Cincinnati, etc., R. Co. v. Armuth*, *supra*, had before it the same question, and while it held that the evidence was not admissible for either of the purposes indicated, it also held that any prejudicial error in that case was cured by an instruction similar to that given in this case. On the authority of that case, we hold that any error resulting from the admission of said evidence was rendered harmless by the instruction indicated.

While the grounds of the motion for new trial chal-

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lenge the action of the trial court in giving and refusing to give the several instructions given and refused, the only reference to instructions found in appellant's points and authorities is contained in proposition 27, which is as follows: "An instruction that the jury, in determining the amount of damages, might consider whether decedent's parents would probably have received from him such personal attention as is usually rendered by a son living with his parents, and that they might consider his love for his parents in arriving at such damages is erroneous because it permits them to go outside the evidence, and because it allows them to consider improper elements of damage."

We assume that this proposition is intended to apply to that part of instruction No. 18, given by the court at appellee's request, which reads as follows, viz.: "If the said decedent and his father and mother lived together as members of a family you may also consider whether said father and mother may have reasonably expected and would have probably received from their said son, Leo Coughlin, such personal attention and services as are usually rendered by a son so living with his father and mother under such circumstances as said decedent lived if you find he did so live as a member of his family considering all the evidence bearing on his character, habits, disposition, conduct, love for his parents and all other facts and circumstances *in evidence which will enable you intelligently to decide the pecuniary loss* suffered by said father and mother, and return a verdict if you find for the plaintiff in such sum as will fully compensate said father and mother for the *pecuniary loss* they have sustained by said decedent's death, not to exceed, however, ten thousand dollars." (Our italics.) We do not think the language quoted is open to the objection indicated.

Error, if any, in giving or refusing to give any
14. other instruction is waived because not presented under appellant's points and authorities. *Nashville, etc., R. Co. v. Johnson* (1915), 60 Ind. App. 416, 431, 106 N. E. 1087, 109 N. E. 912, 917.

Finding no reversible error in the record, the judgment below is affirmed.

NOTE.—Reported in 115 N. E. 260. Master and Servant: master's duty to guard dangerous machinery, 98 Am. St. 290, 18 Ann. Cas. 652, Ann. Cas. 1914A 658; right of action for violation of factory act relative to the guarding of dangerous machinery, L. R. A. 1915E 541, 26 Cyc 1133.

AUFDERHEIDE, TRUSTEE, ET AL. v. HEWARD.

[No. 9,346. Filed October 3, 1917.]

1. **APPEAL.—Questions Reviewable.—Conclusions of Law.—Ruling on Motion for Venire de Novo.**—Where the record discloses no special finding of facts, conclusions of law, or motion for a *venire de novo*, error assigned as to the conclusions of law and in overruling a motion for a *venire de novo* presents no question for review. p. 288.
2. **APPEAL.—Questions Reviewable.—Ruling on Demurrer.—Statute.**—Since the enactment of §348 Burns 1914, Acts 1911 p. 415, an assignment of error that the complaint does not state facts sufficient to constitute a cause of action presents no question for review. p. 288.
3. **APPEAL.—Questions Reviewable.—Ruling on Motion for New Trial.**—Grounds of a motion for a new trial that the verdict is contrary to law, and that the jury erred in the assessment of the amount of recovery, are not available on appeal where the record contains no bill of exceptions. p. 288.
4. **APPEAL.—Review.—Judgment.—Presumption.**—Every presumption is indulged in favor of the judgment of the trial court. p. 288.
5. **APPEAL.—Complaint.—Amendments Deemed Made.**—In an action on a replevin bond, the mere fact, as shown by the record on appeal, that the penalty stated in the bond was less than the verdict for plaintiff is not of controlling influence, as

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- it will be presumed on appeal that the complaint and exhibit were amended below to correspond with the proof. p. 288.
6. **NEW TRIAL.—Grounds.—Error in Amount of Recovery.**—The mere fact that a verdict is for an amount greater than asked in the complaint is not available as a ground for new trial, if in fact the evidence entitles plaintiff to the amount found by the verdict. p. 289.
7. **APPEAL.—Presumptions Favoring Judgment.—Omissions from Record.**—Where the evidence is not in the record, it must be assumed on appeal that the judgment below is in accordance with the evidence, so that grounds of a motion for a new trial that the verdict is contrary to law and that the jury erred in the assessment of the amount of recovery, present no question for review. p. 289.

From Lake Circuit Court; *Martin J. Smith*, Special Judge.

Action by Oliver R. Heward against John H. Aufderheide, trustee, and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

James W. Burns, John C. Wells and Harris & Ressler, for appellants.

Ora L. Wildermuth, for appellee.

HOTTEL, C. J.—This is an appeal from a judgment in favor of appellee for \$400, in an action brought by him on a replevin bond executed by appellants Aufderheide, trustee, and Grantham. The errors assigned and relied on for reversal by appellants are as follows: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling appellants' first specification to strike out certain parts of the complaint; (3) the court erred in its conclusions of law; (4) the court erred in overruling appellants' motion for a *venire de novo*; (5) the court erred in overruling appellants' motion for new trial.

The record discloses no special finding of facts, conclusions of law, or motion for a *venire de novo*, and

hence shows nothing upon which to predicate the

1. third and fourth assigned errors. In fact, appellants very frankly concede in their reply brief that the record is not as they would like to have it, but insist in effect that there is enough in the record to affirmatively show a verdict and judgment in excess of the penalty stated in the bond filed as an exhibit with the complaint. In their reply brief they assert that such a judgment cannot be sustained and say in effect that this question is the only one presented by the appeal.

As presenting this question, appellants rely on the first and fifth assigned errors, *supra*. The first presents no question. §348 Burns 1914, Acts 1911

2. p. 415; *Hedekin Land, etc., Co. v. Campbell* (1915), 184 Ind. 643, 112 N. E. 97.

The grounds of the motion for new trial relied on and now urged as presenting such question are the fifth and seventh, viz.: (5) That the verdict of the

3. jury is contrary to law, and (7) that the jury erred in the assessment of the amount of recovery, it being too large. These grounds of appel-

4. lants' motion are of no avail because the record contains no bill of exceptions. Every presumption is indulged in favor of the judgment of the trial court. *McCutchen v. McCutchen* (1895), 141 Ind. 697, 41 N. E. 324; *Eastman v. Smith* (1914), 56 Ind. App. 621, 105 N. E. 64.

As the record comes to us the fact that the penalty stated in the bond filed as an exhibit with the complaint was for only \$200 is not of controlling influence.

5. This may be the result of an error in copying the bond but, whether this be so or not, if in fact the bond offered and read in evidence was for a different amount, viz., an amount within the verdict, the com-

plaint and exhibit could have been amended below to correspond with the proof, and hence must now be deemed to have been so amended. §401 Burns 1914, §392 R. S. 1881; *Perdue v. Aldridge* (1862), 19 Ind. 290; *Hobbs v. Cowden* (1863), 20 Ind. 310; *Helms v. Appleton* (1908), 43 Ind. App. 482, 489, 85 N. E. 733, 86 N. E. 1023; *White v. Stellwagon* (1876), 54 Ind. 186; *McKinney v. State, ex rel.* (1888), 117 Ind. 26, 30, 19 N. E. 613; *Ke-tuc-e-mun-guah v. McClure* (1890), 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782.

The mere fact that the verdict is for an amount greater than asked in the complaint would not be available as a ground of a motion for new trial if in

6. fact the evidence given upon the trial entitled appellee to the amount found by the verdict.

McKinney v. State, ex rel., supra; Noyes Carriage

7. *Co. v. Robbins* (1903), 31 Ind. App. 300, 67 N. E. 959. The evidence not being in the record,

we must assume in favor of the verdict and judgment below that they are in accord with the evidence given in the case, and hence no question is presented by either said fifth or seventh grounds of appellants' motion for new trial. *Helms v. Appleton, supra; Shigley v. Snyder* (1874), 45 Ind. 541; *Sidener v. Davis* (1879), 69 Ind. 336; *Cosgrove v. Cosby* (1882), 86 Ind. 511; *Winchel v. Howard* (1881), 76 Ind. 379; *Borchus v. Huntington Building, etc., Assn.* (1884), 97 Ind. 180. The judgment below is therefore affirmed.

NOTE.—Reported in 117 N. E. 212.

CHITWOOD v. GARNER.

[No. 9,325. Filed October 3, 1917.]

1. **BOUNDARIES.—Survey by County Surveyor.—Appeal.—Statute.**—Under §9518 Burns 1914, §5955 R. S. 1881, relating to appeals to the circuit court from surveys by the county surveyor, the ultimate question to be determined upon the trial by the circuit court is the correctness of the lines or corners established by the survey, and, if the court is satisfied from the evidence that the true boundary line has been established, the survey should be approved and a re-survey denied, though the result was not obtained by correct procedure in making the survey. p. 292.
2. **BOUNDARIES.—Survey by County Surveyor.—Appeal.—Evidence.**—On an appeal to the circuit court from a survey by the county surveyor, as provided under §9518 Burns 1914, §5955 R. S. 1881, the court properly heard evidence of former surveys in connection with the survey in controversy, and was bound to give it such weight as it merited. p. 292.
3. **BOUNDARIES.—Survey by County Surveyor.—Failure to Appeal.—Conclusiveness of Survey.**—If a former survey was duly made affecting the same land, and the parties to the survey in controversy or their privies were parties to the former survey, it would be conclusive if not appealed from in three years, since §9518 Burns 1914, §5955 R. S. 1881, provides that an appeal from a survey by the county surveyor may be taken within three years. p. 293.
4. **APPEAL.—Review.—Findings.—Conclusiveness.—Survey by County Surveyor.**—In an appeal under §9518 Burns 1914, §5955 R. S. 1881, the question of the correctness of the survey is one of fact, and where there is evidence tending to support the trial court's decision sustaining the survey, the court on appeal cannot say as a matter of law that the line established is not the true boundary line, or hold that the decision is contrary to law. p. 293.

From Hendricks Circuit Court; *Thad S. Adams*, Special Judge.

Controversy between John C. Chitwood and Susan L. Garner originating in appeal to the circuit court from a survey of farm land. From the judgment rendered approving the survey, the former appeals. *Affirmed.*

Chitwood v. Garner—65 Ind. App. 290.

Otis E. Gulley and B. F. Watson, for appellant.

George C. Harvey, Drenan R. Harvey, George R. Harvey and Samuel Ashby, for appellee.

FELT, J.—This case originated in an appeal to the circuit court from a survey of farm lands in Hendricks county. The trial in the circuit court resulted in a finding that the survey had been duly made by the county surveyor, that it was correct, and that a new survey should not be ordered. The judgment rendered was in accord with the finding, and states "that the surveyed line as located, marked and established between the lands of the plaintiff and defendant by John O. Kain be and the same is approved." From this judgment appellant, John C. Chitwood, appealed and assigned several errors, but concedes in his briefs that the only error relied on for reversal comes under the assignment that the court erred in overruling his motion for a new trial. In his original brief he states in substance that the errors relied on are that the decision of the court is not sustained by sufficient evidence, and is also contrary to law, but in the concluding portion of his reply brief he expressly states that he relies for reversal on the proposition "that the finding and judgment of the trial court is contrary to law."

The court heard evidence of the survey in controversy and of former surveys. There is ample evidence to sustain the decision of the court, and therefore independently of appellant's statement in his briefs this phase of the case requires no further consideration.

Appellant contends that the decision of the court is contrary to law because it conclusively appears without substantial conflict that the method employed by the surveyor was wrong, and that the survey was not properly made.

Section 9518 Burns 1914, §5955 R. S. 1881, provides

that: "The survey of such surveyor shall be *prima facie* evidence in favor of the corners so established and the lines so run; but an appeal may be taken to the circuit court, within three years, and such court may reverse such survey. Upon such appeal being prayed for by any person, such surveyor shall, forthwith, transmit the papers in his hands touching the same, and copies of the field-notes in the case complained of, without requiring an appeal-bond; and such court, in trial of such appeal, may receive evidence of other surveys of the same premises, made by the same or other persons, either before or since the one complained of; and if such court shall decide against such surveyor, it shall enter an order for a re-survey, and such new survey may be made by any other competent person whom the court may designate, from whose decision an appeal may be had in like manner."

The foregoing and the succeeding section of the statute show that the ultimate question determined upon the trial by a circuit court of such an appeal is

1. the correctness of the lines or corners established by the survey. If the court is satisfied from the evidence that the true boundary line has been established by the survey it should be approved and a re-survey denied, though the court might believe the result was not obtained by correct procedure in making the survey.

Upon the trial the court followed the statute and heard evidence of other surveys. One of such surveys was made by John W. Trotter, a former county

2. surveyor, in 1898, and the corner in controversy was established by the east survey in conformity with that survey. The evidence also shows that a survey had been made long prior to 1898 and that in 1898 the surveyor was able to find evidences of it and that he took cognizance thereof. Appellant contends that

he was not justified in doing so, and that he was thereby led into an error which was followed in the survey in controversy. Be that as it may, the court properly heard the evidence of former surveys in connection with the present survey and was duty bound to give it such weight as it seemed to merit. If the former survey was duly made affecting the same land, and the parties to this survey or their privies were parties to the former survey, it would be conclusive if not

3. appealed from within three years. Though we cannot state from the evidence presented that such is the case in this instance, the evidence of the former survey tends to show that the corner in dispute in this controversy was correctly established by the last survey. *Wilson v. Powell* (1905), 37 Ind. App. 44, 75 N. E. 611; *Hunter v. Eichel* (1885), 100 Ind. 463; *Herbst v. Smith* (1880), 71 Ind. 44.

If it were conceded that the surveyor did not proceed in the proper manner to establish the lost corner, it would not necessarily follow that the result

4. reached was wrong. The question of the correctness of the survey is one of fact, and, there being evidence which tends to support the decision and sustain the survey, we cannot say as a matter of law on the facts of the case that the line established is not the true boundary line, or hold that the decision is contrary to law.

The conclusion reached makes it unnecessary for us to consider other questions suggested by the briefs.

The identical question as here presented does not seem to have been decided, but the conclusion announced is in harmony with our statutes and in accord with the spirit of our decisions. *Sinn v. King* (1892), 131 Ind. 183, 31 N. E. 48; *Grover v. Paddock* (1882), 84 Ind. 244; *Rosenmeier v. Mahrenholz* (1912), 179

Ind. 467, 101 N. E. 721; *Keesling v. Truitt* (1868), 30 Ind. 306.

Judgment affirmed.

NOTE.—Reported in 117 N. E. 211. See under (1-3) 9 C. J. 294; 110 Am. St. 680.

IN RE BEGGS.

[No. 10,025. Filed October 4, 1917.]

MASTER AND SERVANT.—*Workmen's Compensation Act.—Payment of Compensation in Lump Sum.—Power of Board to Approve.*—Under the Workmen's Compensation Act, Acts 1915 p. 392, the Industrial Board has no power to approve a compensation agreement between the widow and employer awarding the widow a lump sum in place of the award provided in §37 of the act, which authorizes the payment of burial expenses and fifty-five per cent. of decedent's average weekly wages for a period of 300 weeks, where the facts of the case do not show it to be an unusual one within the terms of §43 of the act, providing for the payment of a lump sum, on the approval of the Industrial Board, in unusual cases where weekly payments have been made for not less than twenty-six weeks.

From the Industrial Board of Indiana.

Certified question of law.

Proceedings under the Workmen's Compensation Act in the matter of one Melissa Beggs. Question of law certified by the Industrial Board. *Question answered.*

FELT, J.—The Industrial Board of the State of Indiana has certified to this court a statement of facts, as follows:

“Statement of Facts.

“That on the 14th day of April, 1916, (A), a man of 65 years of age, was in the employment of (B) at an average weekly wage of \$10.00; that on said date, while engaged in the discharge of the duties of his employment, the employe met with an accident arising

out of and in the course of his employment, by coming in contact with a high tension electric wire, as a result of which he was electrocuted, death resulting instantly; that the employer had actual personal knowledge of the said accident and death at the time of their occurrence; that the employe left surviving him as his sole dependent, his wife, 64 years of age, with whom he was living as such at the time of the accident and death; that said employe left no property of any kind except a small amount of household goods; that the wife has no property of her own and no income and no means of support and is practically blind. For several months prior to his death the employe had been complaining of abdominal trouble but had continued to work practically without interruption. On frequent occasions he had expressed the opinion to his wife that he had some serious abdominal trouble and expressed the wish that, upon his death, a post-mortem examination would be made to determine his trouble. After his death, and, in compliance with his expressed wish, an autopsy was held which disclosed the fact that he was suffering from a gastric ulcer and a large abscess between the left lobe of the liver and the inflammatory tissue around the gastric ulcer. The employer, through its insurance carrier, and the widow, have presented to the Industrial Board a compensation agreement providing that the widow shall receive in full settlement and discharge of her claim for compensation, a cash payment of five hundred dollars."

On the foregoing statement of facts the Industrial Board has certified the following questions for our consideration: 1. Does said board have authority under the law to approve a compensation agreement between the widow and the employer for less than 300 weeks' compensation at the rate of \$5.50 per week? 2. If the board should approve such an agreement, would it be

void under §15 of the Indiana Workmen's Compensation Act?

An examination of various workmen's compensation acts shows that they usually contain some provision for commutation of payments to a lump sum, but in each instance where the question has been considered it is recognized that commutation and payment in a lump sum is a departure from the normal method of payment under such acts, and the authority therefor in any given case must be found in the particular legislative enactment under which the parties are proceeding. In some statutes general power is conferred upon the board, or some designated court or tribunal, to which discretionary power is given to pass upon the advisability of commutation and the fairness of the proposed adjustment. In other statutes the power, when conferred, is not so general, and is limited to particular designated cases, or instances, under specified conditions. 1 Honnold, *Workmen's Compensation* §§179, 180, pp. 652-662; C. J. *Workmen's Compensation Acts* §98, p. 102; *Bailey v. United States Fidelity, etc., Co.* (1915), 99 Neb. 109, 155 N. W. 237, 238.

The questions propounded suggest: First, Is there any provision in the Indiana statute, authorizing commutation of payments to a lump sum and, secondly, if the statute gives such authority, Do the facts in the case at bar bring it within such provisions so as to warrant the commutation agreed upon by the parties?

Section 57 of the act (Acts 1915 p. 392) is as follows: "If after fourteen days from the date of the injury or at any time in case of death, the employer and the injured employe or his dependents reach an agreement in regard to compensation under this act, a memorandum of the agreement in the form prescribed by the Industrial Board shall be filed with the board; otherwise such agreement shall be voidable by the em-

ploye, or his dependents. If approved by the board, thereupon the memorandum shall for all purposes be enforceable by court decree as hereinafter specified. Such agreement shall be approved by said board only when the terms conform to the provisions of this act." Section 42, *supra*, gives the board discretionary power to authorize payments to be made monthly or quarterly instead of weekly. Section 43, *supra*, provides that: "Whenever any weekly payment has been continued for not less than 26 weeks, the liability therefor may in unusual cases, where the parties agree and the industrial board deems it to be for the best interest of the employe or his dependents, be redeemed by the payment, in whole or in part, by the employer, of a lump sum which shall be fixed by the board, but in no case to exceed the commutable value of the future installments which may be due under this act." Section 36, *supra*, provides that, when an employe either receives or is entitled to compensation under the act for injury, and dies from any other cause than such injury, payment of the unpaid balance of compensation shall be made to his next of kin, dependent upon him for support. Section 15, *supra*, is as follows: "No contract or agreement, written or implied, no rule, regulation or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this act except as herein provided." Section 66, *supra*, reads as follows: "All questions arising under this act, if not settled by agreement of the parties interested therein with the approval of the board, shall be determined by the board except as otherwise herein provided for." Aside from the general spirit of the act, the foregoing are all the provisions that either directly or remotely bear upon the questions propounded. Section 57, *supra*, deals with certain agreements relating

to compensation, but does not touch the subject of commutation of payments to a lump sum.

The phases of the agreement recognized by such section must therefore relate to the questions that enter into a determination of the compensation due under the provisions of the statute and payable in accordance with the general provisions for weekly payments, and as applied to the case at bar according to the provisions of §37, which authorizes payment of burial expenses and fifty-five per cent. of the average weekly wages of the deceased for a period of 300 weeks. The power of the board to approve the agreements made in pursuance of §57, *supra*, is expressly limited to approval of agreements, the terms of which conform to the provisions of the Workmen's Compensation Act. Section 43, *supra*, provides for payment of a lump sum, on approval by the board, but only in unusual cases where weekly payments have been made for not less than twenty-six weeks. The facts of this case do not bring it within the terms of this section, and we find in the act no other provisions which authorize commutation of weekly payments and the fixing of a lump sum to be paid in full settlement of a claim.

We therefore conclude that the act in question does not give the Industrial Board authority to approve the settlement set forth in the statement of facts aforesaid. The conclusion reached in answer to the first question includes an affirmative answer to the second.

NOTE.—Reported in 117 N. E. 215. See L. R. A. 1916A 172, 262; L. R. A. 1917D 179; Ann. Cas. 1918B 694.

IN RE DOVE.

[No. 10,026. Filed October 4, 1917.]

MASTER AND SERVANT.—*Workmen's Compensation Act.—Construction.—Partial Disability. — Compensation.* — Under §30 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that where injury causes the employe partial disability for work, he shall be paid during such disability a weekly compensation equal to one-half of the difference between his average weekly wages and the weekly wages at which he is actually employed after the injury, for a period not to exceed 300 weeks, and §40, providing that "in computing compensation under the foregoing sections, the average weekly wages of an employe shall be considered not to be more than twenty-four dollars, nor less than ten dollars," where a servant, when injured, earned an average weekly wage of \$56, and during a period of partial disability subsequent to the injury earned an average weekly wage of \$25, he could be awarded additional compensation, since the act does not authorize payment of compensation for the period of partial disability when the injured employe's average weekly wages during such time exceeds twenty-four dollars.

From the Industrial Board of Indiana.

Certified questions of law.

Proceedings under the Workmen's Compensation Act in the matter of one Joe Dove. Certified questions of law by the Industrial Board. *Questions answered.*

IBACH, P. J.—Pursuant to the provisions of §61 of the Workmen's Compensation Law (Acts 1915 p. 392), the Industrial Board has certified to this court the following concise statement of facts and a question of law based thereon: On February 28, 1917, Joe Dove was in the service of the Interstate Iron and Steel Company as an employe at an average weekly wage of \$56. On said date said Dove received a personal injury by an accident arising out of and in the course of his employment of which the employer had actual knowledge at the time. The accident resulted in the total disability of the said Dove to work continuously from the date of

his injury until and including March 28, 1917. The employer paid to said employe two weeks' compensation at the rate of \$13.20 per week. Beginning with March 29, 1917, said Dove has been continuously partially disabled for work and will be so partially disabled until probably the middle of September, 1917. On March 29, 1917, said Dove began the performance of work suitable to his capacity at a weekly wage of \$25 and has continuously worked at said weekly rate until the present time, June 11, 1917, and will have the opportunity to continue to work at said rate as long as he is partially disabled.

Upon the foregoing facts is Dove entitled to compensation on account of partial disability to work beginning on March 29, 1917, and continuing until the expiration of his partial disability to work, and if so, what should be his weekly compensation?

The Workmen's Compensation Act, *supra*, provides that: "Where the injury causes partial disability for work, there shall be paid to the injured employe during such disability * * * a weekly compensation equal to one-half of the difference between his 'average weekly wages' and the weekly wages at which he is actually employed after the injury, for a period not to exceed three hundred weeks," (§30) and, "In computing compensation under the foregoing sections, the average weekly wages of an employe shall be considered not to be more than twenty-four dollars, nor less than ten dollars." §40.

The apparent confusion arises upon the construction of the phrase "average weekly wages" as used in §30 but, when this section is read in connection with §40 in which the meaning of the phrase is fixed by the legislature, it is evident that the former could have no application where the facts are as above stated. In other words, §30 is applicable only where there is a dif-

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ference between the wages actually received by the injured employe after the injury and the "average weekly wages" received by him before the injury, which in no case can be computed at more than twenty-four dollars or less than ten dollars. These limitations placed upon the otherwise broad scope of the act is but another indication that the legislature intended the act as provisional rather than compensatory, and further to refrain from putting a premium on disabled employes.

The statement of facts shows that the injured employe is receiving \$25 per week, and will continue to receive that amount during the full period of his partial disability, and the provisions of the statute do not authorize any additional payment.

NOTE.—Reported in 117 N. E. 210. Workmen's Compensation Act: computation of average earnings of injured employe, L. R. A. 1916A 149, 260; L. R. A. 1917D 175.

KINGAN AND COMPANY, LIMITED, v. MARYLAND CASUALTY COMPANY.

[No. 9,607. Filed March 7, 1917. Rehearing denied June 20, 1917. Petition for leave to file petition to transfer denied October 4, 1917.]

1. **INSURANCE.** — *Indemnity Insurance.—Policy.—Construction.—Duty of Insurer.*—Under an insurance policy indemnifying assured against loss from liability resulting from loss of life or personal injury, not exceeding \$5,000 for the loss of life or injury to any one person, providing that, if suit is brought on account of accident covered by the policy, the company will at its own cost defend such suit, unless it shall elect to settle or pay the assured the indemnity provided by the policy, where suit has been brought the insurer is not obligated to accept an offer of settlement for less than the face of the policy, but it may elect between settlement, defense of the action, or payment of the stipulated indemnity. p. 311.
2. **INSURANCE.** — *Indemnity Insurance.—Policy.—Construction.—Liability of Insurer.—Extent.*—Under an insurance policy in-

demnifying assured against loss from liability resulting from loss of life or personal injury, not exceeding \$5,000 for the loss of life or injury to any one person, providing that, if suit is brought against assured on account of accident covered by the policy, the insurer will at its own cost defend the action, unless it shall elect to settle or pay the assured the stipulated indemnity, the insurer, by electing to defend the suit of a person injured, rather than to settle, did not assume the full risk of the litigation, but was obligated to indemnify the assured only to the extent of the primary indemnity specified by the policy and for such costs as counsel and witness fees, court costs, etc., although the judgment recovered was in excess of the stipulated indemnity. p. 313.

3. **INSURANCE.**—*Indemnity Insurance.—Policy.—Construction.—Liability for Interest on Judgment.*—Where an insurance policy indemnifies against loss or damage, but not against liability, the insurer is not chargeable with interest on a judgment against the assured until the latter has suffered loss by paying the judgment, and submitting the proofs required by the provisions of the policy. p. 315.
4. **INSURANCE.**—*Indemnity Insurance.—Policy.—Construction.—Acts of Assured.*—The fact that insured apparently recognized that his policy indemnified him only against loss or damage, and not against liability, by paying a judgment covered by the policy before making a demand on the insurer, and by furnishing proofs of payment in accordance with the terms of the policy, should not be held to conclude insured, since such recognition may have been based on prudential reasons. p. 316.
5. **INSURANCE.**—*Indemnity Insurance.—Policy.—Construction.—Insurer's Liability for Interest on Judgment.*—A liability policy indemnifying assured against all immediate loss or damage from liability resulting from loss of life or injury to person, provides indemnity against loss or damage and not against liability, so that where insured paid a judgment covered by the policy, the insurer's liability for interest thereon dated from the time of payment only. p. 316.
6. **INSURANCE.**—*Indemnity Insurance.—Action on Policy.—Tender.—Burden of Proof.*—In an action by the insured against the insurer on a liability insurance policy where defendant pleaded tender, the burden was on defendant to establish the facts constituting the tender. p. 319.
7. **TRIAL.**—*Findings.—Ultimate and Evidentiary Facts.*—Only ultimate facts may be properly embodied in a finding, and a mere evidentiary fact included therein does not strengthen it. p. 319.
8. **TENDER.**—*Conditional Tender.—Effect.*—In an action by the

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insured against an insurer, a statement by a representative of the insurer, that he desired to tender insured the amount of money which the company claimed to be the amount due and offered a certain sum in full settlement of its liability, to which the insured replied by refusing the tender with the statement that he did so because he understood that the offer was made on the theory that the amount tendered covered the insurer's entire liability, to which no reply was made, the offer by the insurer was conditional and did not constitute a valid tender. pp. 319, 321.

9. **TENDER.—Tender of Money.—Elements.**—Where money is to be paid, a tender, to be effective, must involve the proper amount and be unconditional, and the circumstances of the offer must be such as to leave the creditor free to accept the amount offered without prejudice to him, and without thereby rendering himself liable to be held to have impliedly admitted that the amount tendered is all that is due. p. 320.

From Marion Superior Court (91,960); *Joseph Collier*, Judge.

Action by Kingan and Company against the Maryland Casualty Company. From a judgment for defendant, the plaintiff appeals. *Reversed*.

W. H. H. Miller, C. C. Shirley, Samuel D. Miller and William H. Thompson, for appellant.

*Alvah J. Rucker, James E. Roca*p and *J. F. Damman*, for appellee.

CALDWELL, J.—Appellant brought this action against appellee to recover on an indemnity insurance policy. A trial resulted in a decision and judgment for costs in appellee's favor. The principal questions presented arise on exceptions reserved to conclusions of law stated on a special finding. The portions of the policy material to the inquiry here are as follows:

"In consideration of the terms, conditions and agreements herein contained, and subject thereto * * * The Maryland Casualty Company * * * hereinafter called 'the company,' does hereby insure Kingan and Company, * * * hereinafter called 'the assured,' * * * against all im-

mediate loss or damage caused by explosion
 * * * of the steam boilers or either of them,
 designated and described in the schedule on this
 policy, as follows: * * *

C. For loss from liability of the assured resulting from the loss of life or personal injury of any person or persons; but the liability of the company for loss of life or injury of any one person shall not exceed the sum of Five Thousand Dollars.
 * * *

D. * * * In no event shall the liability of the company exceed the sum insured by this policy.
 * * *

Conditions and Agreements: * * *

4. It (the insurer) shall have charge of all negotiations and suits on account of claims for damages to persons. * * * But the assured shall at all time render to the company all co-operation and assistance in its power. If any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company's home office every summons or other process as soon as the same shall have been served on him, and the company will *at its own cost* defend such suit in the name and on behalf of the assured, unless the company shall elect to settle the same or pay the assured the indemnity provided for by the provisions of this policy. The assured shall not incur any expense on account of personal injuries without the consent of the company previously given in writing, except that claims for bodily injuries may be settled by the assured on the basis of loss of wages of the injured person for the time of total disability and reasonable expenses for nursing and medical attendance, for which the company will reimburse the assured on receipt of a suitable release without prejudice to the rights of the assured under this policy. * * *

9. * * * No claim shall become payable until proofs and affidavits stating * * * the amount of the loss or damage, and a detailed statement of all other insurance if any covering loss of life or injury to person * * * shall have been furnished to the company."

The policy is set out in full in the finding, which is further to the following effect: On February 29, 1908, while the policy was in force, a steam boiler covered by the policy and located in appellant's plant exploded, and as a proximate result thereof certain physical injuries were sustained by William E. King, appellant's employee. Appellant duly notified appellee of the occurrence. On October 9, 1908, King brought suit against appellant in the Marion Circuit Court to recover damages on account of his injuries, charging appellant with negligence in maintaining the boiler. Appellant notified appellee of the institution of the action as required by the policy, whereupon appellee directed counsel to appear thereto for appellant, and thereafter contested said action in appellant's name. A trial resulted in a verdict against appellant for \$7,500, returned March 3, 1910, on which judgment was rendered July 2, 1910. Appellee thereafter, under the terms of the policy, and in appellant's name, appealed from the judgment to the Supreme Court of the state. On February 20, 1913, the judgment of the trial court was affirmed. On May 1, 1913, appellant paid the judgment, which consisted of the following items: Principal, \$7,500, interest, \$1,422, costs, \$131.25, total, \$9,053.75, and immediately thereafter made demand on appellee for reimbursement, pursuant to the terms of the policy as follows: Appellant demanded the sum of \$6,079.58, consisting of principal, \$5,000, interest from March 3, 1910, to the date of payment, \$948.33, costs, \$131.25. Thereupon appellee presented to appellant a draft for \$5,139.80, being \$5,000 principal, \$131.25 costs, and \$8.55 interest from date of payment of the judgment by appellant to the date of presenting the draft. Appellee refused to accept the draft, assigning the following reasons: First, that it was not a legal tender;

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second, it was less than the amount due; third, a reason expressed in the following language: "Since the letter written to you on May 1, 1913, in which \$6,079.58 was demanded on behalf of Messrs. Kingan & Company, Ltd., it has been discovered that prior to the commencement of this suit, your company had the opportunity to settle and compromise the same by the payment of an amount less than the face of the policy, and that you refused to settle the same on that basis. Under these circumstances, on behalf of Messrs. Kingan & Company, Ltd., we now demand payment by you of the sum of \$9,053.75, being the full amount of the judgment, interest and costs, paid in this case by Messrs. Kingan and Company, Ltd., together with interest thereon from the date of its payment, namely, May 1, 1913." On May 16, 1914, Mr. Dammann, an authorized representative of appellee, had the following conversation with Mr. Miller, an authorized representative of appellant:

"Mr. Dammann: Now Mr. Miller, in view of your letter of the 12th to the Company, concerning the claim of Kingan & Company, Ltd., against the Maryland Casualty Company, on account of the accident to William King in his suit for judgment and satisfaction, I want to make a tender to you as a representative of the Kingan & Company of that amount of money which the Company considers the extent of its liability under the policy of insurance which covered the King case, that is the boiler policy. It is my understanding from the correspondence, that you satisfied a judgment for Kingan & Company, by the payment of \$9,053.75, and that you claim that amount of money from the Maryland Casualty Company. The Maryland Casualty Company denies owing that amount of money to Kingan & Company, and offers in payment of its liability under the boiler policy referred to \$5,149.25, which repre-

sents Five Thousand Dollars, which is the principal of the sum named in the policy, Fifteen Dollars, interest, up to and including the 19th of May, 1913, and \$131.25, and I have here the cash,—and I understand you do not raise a point about that—and if you would rather have it in any other form we are perfectly willing to put it in some other form.’ And to which statement the said Miller replied as follows:

“Mr. Miller: ‘Understanding that this tender is made on the theory that the amount tendered covers the entire liability of the Maryland Casualty Company under the policy of insurance referred to on account of the case of *King v. Kingan & Company, Ltd.*, the tender is refused, but no question is made to the form in which the actual money is tendered.’”

The court further finds “that at said time defendant tendered and offered to pay plaintiff the said sum of \$5,149.25, as recited in said conversation.” Appellee thereafter retained said sum in its possession up to December 16, 1913, (being the day it filed its answer to the complaint), when it paid said sum to the clerk of the court for the use and benefit of appellant, which sum remained in charge of the clerk of the court until about July 3, 1914, when appellee in open court waived any right it had to said fund.

Before King commenced his suit against appellant, he made to appellee a proposition to settle his claim for \$4,000. After the suit was commenced, he made to appellee, through its attorneys, a subsequent proposition to settle for \$6,000. Appellee rejected each proposition, and made no counter-proposition. Before King commenced his action, and also while it was pending, appellant requested appellee to compromise it with King, but appellee refused to do so. Appellant’s attorneys at its request appeared in the King action to protect its interests, and aided in the defense of the cause,

but appellee, through its attorneys, had full and complete charge of the litigation, and conducted the defense thereof, both in the trial court and on appeal in the Supreme Court. On the special finding of facts the court stated general conclusions of law in appellee's favor, to the effect that appellant is not entitled to recover, and that appellee is entitled to recover costs.

In support of its assignment that the court erred in the conclusions of law, appellant states alternatively three propositions, in substance, as follows: (1) That, under the facts found, appellant is entitled to recover the full amount paid by it in discharge of the King judgment, consisting of principal \$7,500, interest \$1,422, and costs \$131.25, aggregating \$9,053.25; (2) that, if appellant is in error in its first proposition, it is entitled to recover the full amount of appellee's liability as fixed by clause C of the policy or \$5,000, plus costs of litigation, \$131.25, plus interest on the entire judgment from the rendition thereof, \$1,422, total \$6,553.25; (3) that, if appellant is wrong in both its first and second propositions, the tender of May 16, 1913, was conditional, and therefore ineffective, and that appellant is entitled to recover \$5,000, the amount of appellee's liability as fixed by clause C, plus costs \$131.25, being a total of \$5,131.25, together with interest thereon from the date on which appellant discharged the King judgment to the date on which appellee in open court waived any right it had to the amount of the tender deposited with the clerk, or from May 1, 1913, to July 3, 1914, but that appellant is entitled to a credit in the amount of the tender as so deposited, and that judgment should have been rendered for the residue, amounting, as estimated by appellant, to \$341.19.

In support of its first proposition, appellant argues in effect that, by the terms of clause C, it was appellee's

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duty absolutely and at all events to protect appellant against loss growing out of liability to King, provided such protection could have been accomplished by the payment of not to exceed \$5,000; that the finding discloses that appellee had an opportunity to settle with King for less than \$5,000 before he instituted action, and that it failed and refused to do so, although appellant's liability to King was clear and well known to appellee; that, had appellee settled with King when the opportunity presented itself, complete protection would thereby have been afforded appellant by the payment of less than \$5,000; that appellee's failure to avail itself of such opportunity to settle resulted in a necessity that \$9,053.75 be paid to discharge appellant's liability to King as determined by the courts; that the excess of liability over the \$5,000 limit specified by clause C of the policy resulted from appellee's breach of duty owing appellant, and that, as a consequence, appellee's liability to appellant should be measured by the entire sum paid by the latter, in satisfaction of the King judgment, \$5,000 thereof by reason of the express provisions of the policy, and the residue thereof by reason of such breach of duty as defined by the policy properly construed.

Appellant, in support of its first proposition, appeals also to that part of specification No. 4 of the policy, providing that:

"If any suit is brought against the assured
* * * the company will *at its own costs* defend such suit in the name and on behalf of the assured, unless the company shall elect to settle the same, or pay the assured the indemnity provided for by the provisions of the policy."

It is appellant's contention, based on the above provisions of specification No. 4, as applied specifically to this case, that when King brought suit against ap-

pellant, and appellee had been duly notified thereof, the latter was put to its election whether it would settle with King when the opportunity arose, or pay to appellant the \$5,000 indemnity specified by clause C of the policy, and thus be discharged from all liability, or defend the action at its own costs in appellant's name; that, if it elected the last alternative, it thereby assumed the entire risk of the litigation; that the risk so assumed covered the excess of the judgment, including costs and interest accruing to the time of its affirmance by the Supreme Court, over and above the indemnity specified by clause C, and hence that appellee is liable to appellant for the entire amount paid by the latter in discharge of the King judgment. Appellant appeals also to that part of clause C providing that appellee insures appellant "for loss from liability of the assured resulting from the loss of life or personal injury of any person or persons," and argues that such provision should be construed with the provision of specification No. 4 last quoted, and that when so construed "they import an absolute promise to protect and indemnify the assured to the extent of its loss, save only in the event the appellee shall elect to settle the case or pay to the assured the amount of the first indemnity."

Appellant's second proposition, as stated by us above, involves the liability of appellee to return to appellant the item of interest that accrued on the judgment from the time of its rendition in the trial court to the time of its final affirmance, amounting to \$1,422. Appellant argues in support of such proposition as follows: "Even if appellee had a right to postpone its election until after trial and judgment in the court below, such judgment is conclusive against appellee both as to liability and the amount of damages, especially when affirmed on appeal, and appellee had no right to delay payment pending the appeal, and thereby cause appel-

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lant to pay the interest accruing on the judgment pending said appeal," and hence appellant concludes that it is entitled to recover such interest in addition to the indemnity specified by the policy, and the costs of the action.

In arguing that an increased liability arose against appellee by reason of its failure to settle with King, appellant assumes that its liability to King was clear, and that appellee knew that it was clear. If it should be conceded that the facts involved in such assumption are important here, in the absence of any finding or allegation in the complaint that appellee was guilty of fraud in its failure to settle with King, then it may be said that the finding does not sustain the assumption. The finding goes no further than that appellee had an opportunity to settle with King for \$4,000, and later for \$6,000, and that it failed and refused to do so, although appellant requested it to make the settlement. The finding is silent as to whether appellant's liability was clear, and what appellee's knowledge on the subject was, and also whether the sum that King was willing to accept in settlement was reasonable, when measured by the severity of his injuries.

Appellant's argument is based also on the assumption that it was appellee's duty under the policy to protect appellant against King's claim, provided

1. such protection might have been accomplished at an expense of not exceeding \$5,000. That is, appellant apparently contends that when the claim was made against appellant by King, based on his injuries, it was appellee's duty to effect a settlement, if it could be done without exceeding the \$5,000 limit, regardless of the apparent merits of the claim, or the reasonableness of the sum demanded. We do not so interpret the policy. Primarily, appellee's agreement was to the effect that in case any person suffered a personal injury

under such circumstances as to render appellant liable to respond in damages therefor, and in case appellant incurred loss or damage on account of such liability, the incident being within the scope of the policy, appellee should make restitution to appellant, if such loss or damage did not exceed \$5,000, or to the extent of such sum if such loss or damage exceeded \$5,000. By the terms of the policy, the planting of an action by King put appellee to its election whether it would defend the action at its own cost and in the name and on behalf of appellant. The alternatives presented to appellee were to settle with King, or pay \$5,000 to appellant. It was appellant's duty to elect to defend or to settle or to pay. It was not its duty to settle to the exclusion of the other alternatives. So the courts hold under similar policies. *Wisconsin Zinc Co. v. Fidelity, etc., Co.* (1916), 162 Wis. 39, 155 N. W. 1081; *Rumford, etc., Paper Co. v. Fidelity, etc., Co.* (1899), 92 Me. 574, 43 Atl. 503; *New Orleans, etc., R. Co. v. Maryland Casualty Co.* (1905), 114 La. 153, 38 South. 89, 6 L. R. A. (N. S.) 562, and note; *Schmidt v. Travelers' Ins. Co.* (1914), 244 Pa. 286, 90 Atl. 653, 52 L. R. A. (N. S.) 126. The institution of the suit created no other duty than to elect. By electing to defend, and by defending, appellee discharged its full duty toward appellant arising at that stage of the proceedings. As there was no duty to settle, the argument must fail. Liability against appellee cannot, in the absence of fraud, be predicated on the fact that it elected to defend, rather than to settle. *Wisconsin Zinc Co. v. Fidelity, etc., Co., supra*. Liability might, however, be based on negligence in conducting such defense, but there is neither a finding nor charge to that effect here. *Wisconsin Zinc Co. v. Fidelity, etc., Co., supra*; *McAleenan v. Massachusetts, etc., Ins. Co.* (1916), 173 App. Div. 100, 159 N. Y. Supp. 401.

Proceeding to the second phase, appellant argues that appellee, by electing to defend rather than to settle, assumed the full risk of the litigation. In other

2. words, that appellee by declining to settle with King, and by electing to defend, impliedly or constructively agreed to pay any loss that appellant might be subjected to as a result of the litigation, and it therefore obligated itself to restore to appellant the full amount that the latter was required to pay to discharge the King judgment, principal, interest, and costs. As to whether such result followed an election to defend must be determined from the policy, the provisions of which applicable are found in clause C and specification No. 4. By the former, appellee insured appellant against all immediate loss or damage growing out of a liability within the scope of the policy to the extent of \$5,000. By the latter, it agreed that in the event of suit being brought, and if appellee elected to defend, it would, "at its own cost defend such suit." Appellee's agreement then was that it would indemnify appellee for loss growing out of liability to the extent of \$5,000, and if it elected to defend the involved suit, to the extent of the additional sum comprehended by the phrase "at its own cost." Such was the extent of appellee's undertaking. If then, appellant having paid the sum which became necessary in order that the King judgment might be discharged, appellee became liable to pay it any sum in excess of \$5,000, such liability arose by virtue of the agreement indicated by the provision that it would "at its own cost defend such suit." The phrase "at its own cost," and equivalent expressions found in indemnity insurance policies in like connections as here, are with a harmony approximating uniformity held to include only such costs as counsel and witness fees, court costs, and the like. We have found no decision holding that such expressions include

the amount of the judgment proper recovered in excess of the primary indemnity specified by the policy, or that the insurer by electing to defend thereby guarantees that the judgment ultimately recovered will not exceed the primary indemnity specified. We are therefore required to hold against appellant on its first proposition. See the following: *Rumford, etc., Paper Co. v. Fidelity, etc., Co., supra*; *Coast Lumber Co. v. Aetna Life Ins. Co.* (1912), 22 Idaho 264, 125 Pac. 185; *Schmidt v. Travelers' Ins. Co., supra*; *Connolly v. Bolster* (1905), 187 Mass. 266, 72 N. E. 981; *New Orleans, etc., R. Co. v. Maryland Casualty Co., supra*; note to *New Amsterdam Casualty Co. v. Cumberland Telephone, etc., Co.*, 12 L. R. A. (N. S.) 478; note to *Aetna Life Ins. Co. v. Bowling Green Gaslight Co.*, 43 L. R. A. (N. S.) 1128.

Appellant cites *Sanders v. Frankfort, etc., Ins. Co.* (1904), 72 N. H. 485, 57 Atl. 655, 101 Am. St. 688. Both the policy and the facts involved in that case are somewhat similar to those here. There, however, the insurer was insolvent, and the injured employee was unable to collect the \$9,000 judgment which he had recovered against the insured. The policy there, as here, specified \$5,000 as the limit of the indemnity. Under the circumstances, the employee proceeded by bill in equity against the insurer, seeking to compel the application of the specified indemnity on the judgment. The question involved was whether the insurer could be required to pay the indemnity before the insured had suffered loss or damage by being forced to pay the judgment. The question of the obligation of the insurer to pay the entire judgment by reason of an election to defend was not involved or decided. The policy there provided in substance that, if suit should be brought, the insurer might elect to defend against the proceeding, or to settle with the injured employee, or to pay

the indemnity to the insured. It is held that the insurer by electing to defend impliedly agreed to defend successfully; that, as an execution is a part of a proceeding, the insurer by such election therefore impliedly agreed to defend against the former as issued on the judgment; that, as payment is ordinarily the only defense that may be successfully interposed against an execution, the insurer, by agreeing to defend against the proceeding successfully, in effect assumed the insured's liability to the extent of the specified indemnity, and, "because they assumed—in legal effect agreed to pay—the assured's liability to this plaintiff to the extent of \$5,000, equity requires them to perform their agreement by payment to him." We do not believe that that case supports the proposition that the insurer by electing to defend thereby obligates itself to pay the entire judgment recovered, although it exceeds in amount the specified indemnity.

Appellant's second proposition is in effect that appellant is entitled to recover in addition to the amount of indemnity specified by clause C and the cost of the action, interest on the judgment of \$7,500 from its rendition by the trial court, or \$5,000 plus \$131.25, plus \$1,422, or a total of \$6,553.25.

We cannot concede under any view of the policy that such proposition as broadly stated and involving as it does a claim to interest on the entire judgment

3. rendered below, may be held to be sound. We proceed to determine whether appellant is entitled to recover any portion of the interest claimed as above stated. Indemnity policies are, as a general rule, by virtue of their provisions and the nature of the insurer's undertaking grouped by the courts into two classes: First, those indemnifying against loss or damage; and secondly, those affording protection against liability. Under a policy of the first class, it

is necessary that the insured show that he has suffered damage or loss as by actually paying the judgment fixing his liability in order that he may have recourse to such policy. Where a policy belongs to the second class, the insured may turn to it for relief as soon as his liability has become legally fixed and established, although he has not suffered actual loss, as by being required to discharge such liability. If the policy here belongs to the first class, appellant's proposition is for such reason unsound, as interest could not be charged against appellee until it was in default, and it was not in default until after appellant had suffered loss by paying the judgment and submitting whatever proofs the policy demanded. After that time, appellee, of course, would be chargeable with interest until payment made or properly tendered. There are indications that

4. appellant apparently recognized that the policy here belongs to the first class: Thus, it paid the judgment here before making a demand on appellant, and it alleged in the complaint that it "as required by said policy of insurance, furnished the defendant with necessary proofs of such payment." Such recognition, however, should not be held to conclude appellant, as it may have been based on reasons purely prudential.

As we have shown, the policy here is to the effect that thereby appellee insured appellant "against all immediate loss or damage * * * as follows:

5. C. For loss from liability of the insured, resulting" etc. Policies containing such provision or its equivalent are as a rule, and by the weight of authority, held to belong to the first class. See the following: *Campbell v. Maryland Casualty Co.* (1912), 52 Ind. App. 228, 97 N. E. 1026; *Connolly v. Bolster*, *supra*; *Wisconsin Zinc Co. v. Fidelity, etc., Co.*, *supra*; *Munro v. Maryland Casualty Co.* (1905), 48 Misc. Rep. 183,

Kingan & Co. v. Maryland Casualty Co.—65 Ind. App. 301.

96 N. Y. Supp. 705; *Carter v. Aetna Life Ins. Co.* (1907), 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155; *Frye v. Gas, etc., Co.* (1903), 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. 500; *Allen v. Gilman, etc., Co.* (1905), 137 Fed. 136; *Allen v. Aetna Life Ins. Co.* (1906), 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958, and note; *Cushman v. Carbondale Fuel Co.* (1904), 122 Iowa 656, 98 N. W. 509; *Conqueror Zinc, etc., Co. v. Aetna Life Ins. Co.* (1910), 152 Mo. App. 332, 133 S. W. 156; *Poe v. Philadelphia Casualty Co.* (1912), 118 Md. 347, 84 Atl. 476; *Cayard v. Robertson* (1910), 123 Tenn. 382, 131 S. W. 864, 30 L. R. A. (N. S.) 1224; *Beyer v. International, etc., Co.* (1906), 115 App. Div. 853, 101 N. Y. Supp. 83; *Goodman v. Georgia Life Ins. Co.* (1914), 189 Ala. 130, 66 South. 649; *Burke v. London Guarantee, etc., Co.* (1905), 47 Misc. Rep. 171, 93 N. Y. Supp. 652; note to *Patterson v. Adan*, 48 L. R. A. (N. S.) 184.

As appellee was not in default until after appellant had paid the judgment, it follows that the former's liability to pay interest dates from that time, and that we are required to hold against appellant on the second proposition. *Maryland Casualty Co. v. Omaha Electric, etc., Co.* (1907), 157 Fed. 514, 85 C. C. A. 106; *Conqueror Zinc, etc., Co. v. Aetna Life Ins. Co.*; *supra*; *Munro v. Maryland Casualty Co.*, *supra*; *Aetna Life Ins. Co. v. Bowling Green Gaslight Co.*, *supra*, 1130, note; *Davison v. Maryland Casualty Co.* (1908), 197 Mass. 167, 83 N. E. 407; *Coast Lumber Co. v. Aetna Life Ins. Co.*, *supra*; *Puget Sound, etc., Co. v. Frankfort, etc., Ins. Co.* (1909), 52 Wash. 124, 100 Pac. 190.

An examination of the cases above cited will disclose that, in the policy involved in a number of them, there was a provision—absent from the policy here—referred to by the cases as “the no action provision,” to the ef-

fect that no action should be brought against the insurer as respects any loss under the policy, unless it should be brought by the assured himself to reimburse him for a loss actually sustained and paid by him. It will be observed that some force is given to such provision by many of the cases in determining that the policy involved belonged to the first class, as above indicated. There was such provision, numbered provision 8 in the policy involved in *Campbell v. Maryland Casualty Co.*, *supra*, in addition to a provision in the body of the policy equivalent to that last quoted in the policy here. In the *Campbell* case, this court apparently held that the provision included in the body of the policy was sufficient to classify it, the court saying: "The language quoted from the body of the policy, as well as the language in provision number No. 8, * * * would seem to indicate that the purpose of the contract was to indemnify the assured against loss and not to protect it against liability." That case subsequently received the approval of the Supreme Court by the denial of a transfer. On the proposition now under consideration, *Sanders v. Frankfort, etc., Ins. Co.*, *supra*, is not in harmony with the views which we have expressed. That case is discredited by a number of the cases above cited, including *Campbell v. Maryland Casualty Co.*, *supra*. There are also several recent cases, not cited in the briefs and involving the rights of an injured employe, as against the insurer of an employer, that contain language apparently not in harmony with our conclusion, or with many of the cases above cited. Among such cases are the following: *Davies v. Marylana Casualty Co.* (1916), 89 Wash. 571, 154 Pac. 1116, L. R. A. 1916D 395; *Maryland Casualty Co. v. Peppard* (1916), 53 Okl. 515, 157 Pac. 106, L. R. A. 1916E 597; *Patterson v. Adan*, *supra*. In these cases, force is given to the fact that the insurer controlled the litiga-

tion to the exclusion of the insured. Here, also, the insurer had charge of the defense in the King case, but appellant, by attorneys of its own selection, participated actively therein. Here appellant, recognizing its obligation to do so, paid the King judgment before making any demands on appellee. The rights of an injured employe are not involved. It follows that, in this case, it is not necessary to determine, and we do not determine, the rights of such an injured employe under such a policy as is involved here, based on some equitable consideration, growing out of the fact that, having recovered a judgment against his employer, he is for some reason unable to collect it.

We proceed to the question of tender. The burden was on appellee to establish the facts constituting the tender as pleaded. We have hereinbefore set out

6. in full the facts respecting such tender as embodied by the court in its finding. Such facts consist wholly of a conversation between Mr.

7. Dammann and Mr. Miller, set out in the finding verbatim. The facts as found were evidentiary, rather than ultimate. It is true that in the finding immediately following the statement of the conversation the court added the following: "That at said time defendant tendered and offered to pay plaintiff said sum of \$5,149.25, as recited in said conversation." It is evident though that by such statement in the finding the court refers to the physical act of offering the money to appellant, rather than that thereby the court intended to reduce the ultimate fact of a tender. Only ultimate facts may properly be embodied in a finding. A mere evidentiary fact does not strengthen it. We might very consistently terminate this discus-

8. sion on the ground that the ultimate fact of a tender is not found, but if we should assume for purposes of discussion that the situation here is such

that this court might from the evidentiary facts found deduce the ultimate fact, as to which see *Knight v. Kerfoot* (1915), 184 Ind. 31, 110 N. E. 206; *Shedd v. American Maize, etc., Co.* (1915), 60 Ind. App. 146, 163, 108 N. E. 610; *Smith v. Wells Mfg. Co.* (1897), 148 Ind. 333, 342, 46 N. E. 1000; *Horn v. Lupton* (1914), 182 Ind. 355, 361, 105 N. E. 237, 106 N. E. 708; and *Harris v. Riggs* (1916), 63 Ind. App. 201, 112 N. E. 36, 38, still on such assumption, we do not believe that the finding discloses a tender. Mr. Dammann's statement was to the effect that he desired to tender that amount of money which his company claimed to be the amount due. He then referred to the fact that appellant claimed that the amount of the liability was \$9,053.75, and that appellee claimed the amount to be \$5,149.25. He thus emphasized the fact of a controversy. Next he stated that he offered the latter sum "in payment of its liability." Mr. Miller then in behalf of appellant refused the tender with the statement that he did so on the ground that he understood that the offer was made on the theory that the amount tendered covered the entire liability. Mr. Dammann received such statement in silence.

Among the elements of a tender, where money is to be paid, in order that such tender may be effective as such,

are that it must involve the proper amount and

9. be unconditional. If either of such elements is lacking, the tender is ineffective. The circumstances of the offer must be such as to leave the creditor free to accept the amount offered without prejudice to him, and without thereby rendering himself liable to be held to have impliedly admitted that the amount tendered is all that is due. It is held that a sum offered as "a settlement," or "in full discharge," or "as payment in full," is invalid. 38 Cyc 137, 152; *Reed v. Armstrong* (1862), 18 Ind. 446; *Martin v. Bott* (1896),

Kingan & Co. v. Maryland Casualty Co.—65 Ind. App. 301.

17 Ind. App. 444, 46 N. E. 151; *Bickle v. Beseke* (1864), 23 Ind. 18; *Smith v. School District* (1913), 89 Kan. 225, 131 Pac. 557, Ann. Cas. 1914D 139; *Union, etc., Mining Co. v. Shandon Mining Co.* (1913), 18 N. M. 153, 135 Pac. 78; *Noyes v. Wyckoff* (1889), 114 N. Y. 205, 21 N. E. 158.

It is held that a tender made of all that is admitted to be due, or that where the sum offered is all that the person making the tender considers to be due, or

8. as all that is due, or where the sum is offered as the amount of the creditor's bill, or as the balance due upon a note, is valid. Hunt, Tender §239. The author says, however, in the same section: "The illustrations given are dangerously near the dividing line between conditional and unconditional tenders, and such expressions ought to be avoided in making a tender." It is also held that where the circumstances attending and surrounding the tender create an equivocal or ambiguous situation, the question of the validity of the tender is one of fact for the jury to determine under proper instructions. *Miller v. Holden* (1846), 18 Vt. 337; *Eckstein v. Reynolds* (1837), 2 Nev. & P. 256. Mr. Dammann, by his statement, at least created a situation so uncertain as to his purpose that Mr. Miller was justified in seeking to ascertain what the former had in mind. Mr. Dammann, however, stood silent. The circumstances were such as to require that he make himself clear. He could have easily said that he was not seeking to create an appearance of accord and satisfaction, or to force from Mr. Miller an admission based on the things done and said, but that his purpose was merely to offer the amount which his company claimed to be due, leaving the appellant free to accept without any prejudice as to the additional sum which it claimed to be due. We are impressed, even

on the assumption above indulged, that the situation here did not show a valid tender.

Other questions are presented, but they are not of controlling importance.

The judgment is reversed, with instructions to the court to restate its conclusions of law to the effect that appellant is entitled to recover from appellee the sum of \$5,131.25, with interest thereon at six per cent. from May 1, 1913, and that appellee is entitled to have applied thereon the said sum of \$5,149.25, offered and paid into the clerk's office as a tender, with interest thereon from July 3, 1914, and that appellant is entitled to recover costs. The court is directed to enter judgment accordingly.

NOTE.—Reported in 115 N. E. 348. Indemnity insurance, construction of policy, 100 Am. St. 775.

JOHNSON ET AL. v. GEPHART ET AL.

[No. 9,431. Filed October 9, 1917.]

1. *APPEAL.—Briefs.—Sufficiency.—Rules of Court.*—Appellant's brief is sufficient as against a motion to dismiss on the ground that it does not comply with Rule 22 of the Appellate Court by properly giving the page and line of the matter referred to in the record, where the brief purports to indicate the page and line of the transcript where the record set out or referred to will be found, and appellees have not pointed out wherein appellants have failed in this respect. p. 325.
2. *APPEAL.—Briefs.—Sufficiency.—Rules of Court.*—An appeal will not be dismissed on the ground that appellant's briefs fail to comply with Rule 25 of the Appellate Court, requiring briefs to be printed or typewritten on paper of a specified size, leaving a margin of at least one inch on the left side, where the briefs, except the covers, are printed, although the pages have little or no margins, the briefs so present at least some of the questions attempted to be raised that they can be determined without reference to the record. p. 326.
3. *APPEAL.—Briefs.—Sufficiency.—Motion to Dismiss.*—Whenever briefs are sufficient under the rules of court to present any question, a motion to dismiss the appeal because of the failure

of the brief to comply with the rules will be overruled, and the questions presented determined. p. 326.

4. **APPEAL.—Assignment of Error.—Refusal to Strike out Parts of Deposition.**—An assignment of error predicated on the overruling of a motion to strike out certain parts of a deposition presents no question for review. p. 326.
5. **APPEAL.—Review.—Examination of Witnesses.—Refusal to Strike Out Parts of Deposition.**—In an action to recover damages for the alleged wrongful removal from plaintiffs' land of certain buildings erected thereon under a lease and subsequently sold by the lessee to defendants, where the lessee, when asked by questions in his deposition whether he had been engaged in business in a certain city and if he knew the parties to the suit and whether plaintiffs claimed any right to the buildings prior to their sale, included in his answers statements to the effect that he had a right to sell the buildings, because he only rented the land for the year, that he agreed to, and did, pay one of the plaintiffs thirty dollars and also fifteen dollars to said plaintiff's wife, who claimed an interest in the land, that he just rented the ground and could do as he pleased with it, that it was customary for him in conducting his business to move his buildings from place to place, that he had a right to sell the buildings to defendants and they had a right to move them, and that it was the understanding between plaintiffs and himself that under the contract he could remove the structures at his pleasure, or allow a purchaser to do so, such statements were not responsive to the questions and involved conclusions of the witness, and it was reversible error, in view of the issues, for the trial court to overrule a motion to strike such answers from the deposition. pp. 328, 330.
6. **EVIDENCE.—Opinion Evidence.—Construction of Contracts.**—In an action to recover damages for the alleged wrongful removal of certain buildings from plaintiffs' land, where the question at issue and the ultimate fact to be determined by the jury was whether the lessee, who erected the structures and subsequently sold them to defendants, agreed to give the plaintiffs the buildings in controversy as a part consideration for use of the land, the lessee's testimony that he had a right to sell the buildings or remove them and that this was the understanding between himself and the plaintiffs was incompetent as the expression of an opinion concerning the construction of the lease. p. 328.
7. **EVIDENCE.—Depositions.—Conclusions.—Striking Out.**—The rule making incompetent opinions or legal conclusions applies as well to evidence presented by deposition as to the examination of a witness before the jury. p. 329.

8. **APPEAL.**—*Review.*—*Evidence.*—*Admissibility.*—*Refusal to Suppress Deposition.*—In an action to recover damages for the alleged wrongful removal from plaintiffs' land of buildings erected thereon under a lease, where plaintiffs testified that they had an agreement with the lessee that they should have the buildings as a part of the rental consideration, and the only contradictory evidence consisted of improper and incompetent answers given by the lessee in his deposition, the trial court's denial of a motion to strike out such answers was harmful to plaintiffs. p. 329.
9. **APPEAL.**—*Questions Reviewable.*—*Admission of Evidence.*—*Briefs.*—Appellants' objection to the admission of evidence is not available on appeal, where their briefs do not refer specifically to any evidence, nor disclose that the objection made on appeal was made at the trial. p. 329.
10. **APPEAL.**—*Harmless Error.*—*Admission of Evidence.*—*Cure by Instructions.*—In an action to recover damages for the alleged wrongful removal of buildings erected by a lessee on plaintiffs' land, which adjoined a railroad right of way, error, if any, in the admission of testimony that the buildings in controversy were partly on plaintiffs' land and partly on the railroad's right of way was harmless, where the court instructed the jury that, if the lessee agreed with the plaintiffs to leave the buildings on their premises as their property, it should find for plaintiffs. p. 329.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Robert Johnson and another against George Gephart and another. From a judgment for defendants, the plaintiffs appeal. *Reversed.*

Lesh & Lesh, for appellants.

Fred H. Bowers and *Milo N. Feightner*, for appellees.

HOTTEL, C. J.—This is an appeal from a judgment rendered by the Huntington Circuit Court on a verdict for appellees, in an action brought against them by appellants to recover damages alleged to have been sustained by them by reason of appellees' wrongful acts. The complaint is in one paragraph and alleges that appellees unlawfully entered upon appellants' premises and tore down and removed certain buildings thereon,

and converted the timbers thereof to their own use, whereby appellants were damaged, etc. Appellants assign as error and rely for reversal upon: (1) The overruling of their motion to strike out certain parts of the deposition of Joseph Rocco; (2) the overruling of their motion for new trial.

Appellees, in their answer brief, insist that the appeal should be dismissed for the following alleged reasons: (1) Because the bill of exceptions containing the evidence is not in the record; (2) because "appellants have not complied with Rule 22 in preparing their brief by properly giving page and line of matter referred to in the record"; (3) because appellants have not complied with Rule 25 of this court "by printing all of said brief and by leaving marginal space on the various pages of the brief."

In support of their first reason, *supra*, for dismissal of the appeal, appellees assert in their said brief that the record shows that the bill of exceptions was not filed with the clerk of the trial court after it had been signed by the judge thereof. Any omission or deficiency of the record in said respect has been supplemented and cured by the return of the clerk of the trial court to a writ of *certiorari* issued at the direction of this court by its clerk since the filing of appellees' said briefs. It follows that appellees' said first ground for dismissal no longer exists.

As to their second ground, *supra*, it is sufficient to say that appellants' briefs purport to indicate the page and line of the transcript where the record set out or

1. referred to in such briefs will be found, and appellees have not pointed out wherein appellants have failed in this respect.

As affecting the third ground for dismissal, *supra*, it should be stated that said briefs, except the covers thereof, are printed, and, though their pages have

2. little or no margins, the briefs present at least some of the questions attempted to be raised in such a manner that this court can determine them without reference to the record. Whenever the briefs are sufficient under the rules to present

3. any question, a motion to dismiss the appeal because of the failure of the briefs to comply with such rules will be overruled, and the question or questions so presented considered and determined. *Wheeler v. Barr* (1893), 6 Ind. App. 530, 33 N. E. 975; *Stamets v. Mitchenor* (1905), 165 Ind. 672, 75 N. E. 579; *Town of New Carlisle v. Tullar* (1915), 61 Ind. App. 230, 110 N. E. 1001; *Johnson v. Sherwood* (1904), 34 Ind. App. 490, 73 N. E. 180; *Deal v. Plass* (1915), 59 Ind. App. 185, 109 N. E. 51; *Smith v. Smith* (1915), 59 Ind. App. 169, 109 N. E. 60. It follows that appellants' second and third grounds, *supra*, will not warrant a dismissal of the appeal.

We now consider such of the errors relied on by appellant for reversal as are presented by their briefs.

The first assigned error presents no question

4. (*Radcliff v. Radford* [1884], 96 Ind. 482; *Burnett v. Milnes* [1897], 148 Ind. 230, 46 N. E. 464), but the rulings of the trial court sought to be presented for review by such assigned error were made grounds of the motion for new trial and are presented by the second assigned error, *supra*. Said rulings present the controlling question in this case, and will be now considered.

The questions and answers of the deposition of said Rocco on which the rulings of the trial court, claimed by appellant to be erroneous, are predicated are as follows: "Q. 2. Have you been engaged in business in Huntington, Indiana, in the last year or so, and do you know Robert Johnson and Albert Johnson, plaintiffs in this suit, and George and Mary Gephart, defendants?"

"A. Yes, I was engaged in the business of keeping a boarding house while construction work was going on of the Erie Railroad Company in Huntington, * * * from the ——— day of October, 1913, until the ——— day of October, 1914, and I know Robert Johnson and Albert Johnson. I rented from Albert Johnson certain grounds upon which I built my boarding shacks, one about 18 x 96 and the other 12 x 16, and I know George and Mary Gephart, I sold said buildings or shacks to them when I left there, the larger one they paid me thirty dollars for and the small one, five dollars, and *I had a right to sell them, because I only rented the land from Albert Johnson for the year, agreeing to, and did pay him thirty dollars, and later his wife, who was separated from him at the time, came to me and claimed an interest in the land and I paid her fifteen dollars more, they both claiming that half of the ground belonged to her.*"

* * *

"Question 4. Did Mr. Johnson ever claim any right to the buildings after you put them there before you sold them to these parties?"

"A. He did not. *I just rented the ground from him, and I could do what I pleased with it, it was usual and customary for me to take my buildings from place to place with construction work and camps and I had a right to sell these shacks or buildings to these people and they had a right to move them off, it being the understanding with Johnson and myself in our contract that I should remove them at my pleasure, or allow any one else to remove them that I sold them to.*" (Italics inserted.)

Before the trial, appellants filed their written motion to strike out and suppress the parts of said deposition that we have italicized above, and other parts thereof. This motion was overruled. Appellees offered this de-

position in evidence at the trial, whereupon appellants again moved to strike out and suppress said above italicized portions and other portions. This motion was overruled, and the deposition, including said portions, was read in evidence, said portions being read over the objection and exception of appellants.

The grounds upon which appellants predicated their motion to strike out and which are now urged in this court are in effect that such italicized matter is

5. not responsive to the questions propounded and involves voluntary statements of the deponent in which he gives his own conclusions as to the effect of his contract with appellants. We think these objections are well taken. The parts of the answers italicized are clearly not responsive to the question propounded, and, while this infirmity in the answers would not, in and of itself, furnish a sufficient ground for reversal if the answers were otherwise competent and unobjectionable (*Baltimore, etc., R. Co. v. Morris* [1913], 54 Ind. App. 479, 103 N. E. 35; *First Nat. Bank v. Ransford* [1913], 55 Ind. App. 663, 104 N. E. 604; *Eckart v. Ft. Wayne, etc., Traction Co.* [1913], 181 Ind. 352, 104 N. E. 762), said matter is equally open to the other objection made by appellants. In this case, the question whether Rocco agreed to give plaintiffs the buildings in controversy as part

6. consideration for the use of the land was the real question in issue, and the ultimate fact to be determined by the jury. As the court said in the case of *American Telephone, etc., Co. v. Green* (1904), 164 Ind. 349, 354, 73 N. E. 707, 708: "It is not proper to allow one who is not an expert to express an opinion in any case upon a question with relation to which all the facts may be placed before the jury; and to receive as evidence the opinion of a lay witness upon the precise issue submitted for trial in such case would permit the wit-

ness to usurp the province of the court or jury trying the cause. * * *

"In matters of opinion or legal conclusion of this character (as to whether the witness had authority from the defendant to contract with the plaintiff so as to bind the defendant to pay the plaintiff \$40 monthly during his disability from an injury sustained while in the employ of the defendant) the trial tribunal is as well qualified to reason out the resultant opinion as the witness, and under the law it alone is competent to do so." See, also, *Jackson v. Todd* (1877), 56 Ind. 406; *Eckart v. Ft. Wayne, etc., Traction Co., supra*; *Week v. Rawie* (1911), 48 Ind. App. 599, 96 N. E. 206. This rule applies as well to evidence presented by deposi-

7. tion as to the examination of a witness before the jury. *Week v. Rawie, supra*.

Each of the appellants testified positively to an agreement with Rocco that they should have said buildings as a part of the rental consideration. The only

8. evidence contradicting this testimony was that to which said motion was addressed. It follows that said ruling was of controlling influence in the case and was necessarily harmful to appellant.

Appellants object generally to some testimony as to the location of the buildings in question with reference to appellants' farm and the railroad right of

9. way. Their brief does not refer specifically to any testimony, nor does it disclose that the objection now made was made at the trial. For these reasons it is not available. *German Fire Ins. Co. v. Zonker* (1914), 57 Ind. App. 696, 108 N. E. 160. Aside from this, the court instructed the jury, in ef-

10. fect, that if they should find that Rocco agreed with appellants to leave the buildings on their premises as their property, they should find for appellants. In view of this instruction, the testimony of

some of the witnesses that the building was partly on appellants' farm and partly on the right of way cannot have harmed appellants.

Appellants challenge the sufficiency of the evidence to sustain the verdict, and the action of the trial court in refusing to give their instruction No. 3, but in view of our disposition of this appeal, we deem it unnecessary to consider these questions.

Because of the errors in refusing to strike out and suppress the italicized parts of the deposition of Joseph

Rocco, above set out, appellants are entitled to

5. a new trial. Judgment reversed and cause remanded, with instructions to the trial court to grant a new trial, and for such other proceedings as are not inconsistent with this opinion.

NOTE.—Reported in 117 N. E. 270.

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA v. INDIANA REDUCTION COMPANY.

[No. 9,318. Filed October 9, 1917.]

1. INSURANCE.—*Fire Insurance Policy.—Action.—Evidence.*—In an action to recover on fire insurance policies, uncontradicted evidence showing the issuance of the policies and the payment of premiums thereon, the occurrence of a fire damaging the property insured in an amount in excess of the total amount of insurance and that verified proofs of loss furnished the insurer were not returned or objected to by it, is sufficient, standing alone, to entitle plaintiff to a recovery. p. 334.
2. INSURANCE.—*Fire Insurance.—Conditions Avoiding Policy.—Construction.*—A provision in a policy of insurance declaring it void, if a prohibited article is kept or used on the premises, merely means that it shall be voidable at the election of the insurer. p. 335.
3. INSURANCE.—*Fire Insurance.—Conditions Avoiding Policy.—Waiver.*—Where an article, the keeping of which on the premises insured is prohibited by the policy, is kept and used on the

Insurance Co., etc. v. Indiana Reduction Co.—65 Ind. App. 330.

- premises at the time of the issuance of the policy and acceptance of the premium therefor, and the insurer knows that fact at the time, it waives the right to avoid the policy because of the prohibited act. p. 335.
4. **INSURANCE.—Fire Insurance.—Conditions Avoiding Policy.—Waiver.**—Where the insurer has no knowledge that a prohibited article is being kept or used on the insured premises at the time of the issuance of the policy, but subsequently discovers such fact, it must tender back the premium received within a reasonable time thereafter, and, upon its failure to do so, it will be deemed to have waived the right to declare the policy void; and this rule is applicable even where the keeping and using of a prohibited article is not discovered until after a loss has occurred. p. 336.
5. **INSURANCE.—Fire Insurance.—Knowledge of General Agent.**—An insurance company is chargeable with any knowledge possessed by its general agent as to facts material to the risk. p. 336.
6. **INSURANCE.—Fire Insurance.—Insurance Brokers.—Knowledge.**—An insurance broker, acting within the scope of his authority, is the agent of the company from which he secures insurance, and his knowledge relating to the risk is binding on the company, though not communicated to it. p. 337.
7. **INSURANCE.—Fire Insurance Policy.—Action.—Directing Verdict.**—In an action on a fire insurance policy containing a provision prohibiting the keeping or using of gasoline in the insured premises, where the undisputed evidence showed that the broker writing the insurance knew that at the time the policies were issued, and continuously thereafter, large quantities of gasoline were stored on the premises and used by insured in the conduct of its business, that the premiums were paid, that, after damage by fire, insured furnished the insurer proofs of loss which were retained without objection, that the company's general agent, shortly after the fire, learned of the use of gasoline on the premises, and that the insurer failed to return, or to offer to return, the premiums received, the direction of a verdict for plaintiff was proper; and the fact that the agency of the broker was controverted was immaterial in view of the knowledge of the prohibited acts possessed by the company's general agent. p. 337.
8. **APPEAL.—Waiver of Error.—Briefs.**—Errors assigned as grounds for new trial are waived by appellant's failure to present them in its briefs. p. 338.
9. **INSURANCE.—Fire Insurance.—Action on Policy.—Evidence.—Admissibility.**—In an action to recover on a fire insurance policy covering premises used for degreasing garbage, evidence as

to the process of degreasing and the use of gasoline therein was admissible as tending to show that the insurer had at least constructive knowledge of the use of gasoline on the premises, although its use was prohibited by a clause in the policy. p. 338.

10. EVIDENCE. — *Conclusions.*—*Admissibility.* — Evidence in the nature of conclusions is not admissible. p. 338.

11. APPEAL.—*Review.*—*Harmless Error.*—*Exclusion of Evidence.* —In an action on a fire insurance policy, error, if any, in excluding evidence relating to the insurer's knowledge of the use of gasoline on the premises insured, was harmless, where such evidence did not tend to disprove undisputed facts clearly establishing the insurer's knowledge of the practice. p. 338.

From Hendricks Circuit Court; *George W. Brill*, Judge.

Action by the Indiana Reduction Company against the Insurance Company of the State of Pennsylvania and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

James Bingham, Remster A. Bingham and Edgar M. Blessing, for appellants.

Leander J. Monks, John F. Robbins, Henry C. Starr and James P. Goodrich, for appellees.

BATMAN, J.—Appellee commenced a separate action against each of appellants to recover on certain fire insurance policies issued by them and held by it, covering the same property and destroyed by the same fire. These actions were each put at issue on the part of appellants by filing their respective answers in general denial, and also affirmative paragraphs, predicated on certain stipulations in the policies in suit. The only one pertinent to the questions presented by this appeal being as follows:

"This entire policy, unless otherwise provided by agreement endorsed thereon or added hereto, shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises * * * gasoline."

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Each of such affirmative paragraphs of answer charge, among other things, that appellee, without appellants' knowledge, consent, or permission, kept, used, and allowed gasoline on the insured's premises, and thereby voided the policy on which such action was based. To said affirmative paragraphs of answer appellee filed replies in general denial, and special replies alleging in substance, among other things, that at the time the policies sued on were received by appellee, it was engaged in the process of degreasing garbage, and that in such process it was necessarily required to keep and use gasoline on the premises insured, as appellants at all times well knew; that it did so keep the same under such policies, with the knowledge and consent of appellant, and as a necessary part of its said business; that it at no time stored, kept, or used more gasoline on said premises than the need of its business at such times required; and that the gasoline so kept and used did not in any manner cause or contribute to the fire, causing the loss in question. By agreement, the two actions were consolidated and tried together as a single case by a jury. At the close of the evidence the jury, under a peremptory instruction, returned a verdict in favor of appellee against appellant, the Insurance Company of the State of Pennsylvania, for \$1,674, and against appellant, Pacific Fire Insurance Company, for \$2,232, and judgments were rendered accordingly. Appellants filed their motion for a new trial, which was overruled, and proper exceptions reserved by each. This action of the court constitutes the sole error assigned by appellants and relied on by each for a reversal. The motion for a new trial was based on the following reasons: (1) The court erred in giving to the jury at the close of the evidence a peremptory instruction to return a verdict for the plaintiff; (2) the verdict of the jury is not sustained by sufficient

evidence; (3) the verdict of the jury is contrary to law; (4) errors of law occurring at the trial with reference to the admission and rejection of certain evidence. As the two cases involve the same questions of law and fact, we will consider them as one in determining the questions presented.

On the trial it was shown by uncontradicted evidence, or by the admission of the parties, that the policies in suit were duly issued on August 10, 1912, and

1. the premiums thereon paid; that a fire occurred on August 25, 1912, by which the property insured by said policies to the value of \$72,280 was destroyed; that at the time of such fire the total amount of insurance held by appellee on the property was \$45,500, which included the policies in suit; that at the time of such loss the total value of the property covered by the policies was \$102,370; that after the fire proper verified proofs of loss were made out in writing, and delivered to appellants on September 6, 1912; that the proofs of loss were never returned, and no objections thereto were ever made to appellee, but no payment was ever made under the policies on account of the loss. This evidence, standing alone, would entitle appellee to a recovery.

Appellants' sole defense is based on a claim that, notwithstanding such facts, appellee is not entitled to recover for the reason that it voided the policies in suit by keeping and using gasoline on the insured premises, contrary to the provisions of the policies. As affecting this contention the undisputed evidence shows that at the time of the issuance of the policies, and continuously thereafter to the time of the fire, large quantities of gasoline were stored on the premises covered by the policies, and used by appellee in the conduct of its business thereon; that the insurance broker, through whom appellants secured the risks, while acting within

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the scope of his authority prior to the issuance of the policies, learned that appellee was keeping and using gasoline on the premises in the conduct of its business, and knew such fact when the policies were delivered; that the general agent of appellants, who countersigned the policies, learned such fact within four or five days after the fire occurred, but appellants did not at any time return, or offer to return, to appellee any portion of the premiums paid for the policies.

On this state of facts, the court gave the jury a peremptory instruction to return a verdict for appellee, which was done. Appellants' motion for a new trial calls in question the action of the court in so doing. The following rules of law, pertinent to the question before us, are well settled in this state: A provision

- in a policy of insurance, declaring it void if a
2. prohibited article is kept or used on the premises, means only that it shall be voidable at the election of the insurer on the happening of such event. *Western Ins. Co. v. Ashby* (1913), 53 Ind. App. 518, 102 N. E. 45; *Aetna Life Ins. Co. v. Bocking* (1906), 39 Ind. App. 586, 79 N. E. 524; *Metropolitan Life Ins. Co. v. Johnson* (1911), 49 Ind. App. 233, 94 N. E. 785; *Glens Falls Ins. Co. v. Michael* (1906), 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; *Commercial Life Ins. Co. v. Schroyer* (1911), 176 Ind. 654, 95 N. E. 1004, Ann. Cas. 1914A 968. Where such prohibited article is being kept and used on the
 3. insured premises at the time of the issuance of such policy and acceptance of the premium therefor, and the insurer knows such fact at the time, it waives the right to declare the policy void on account of such prohibited act. *Ohio Farmers Ins. Co. v. Vogel* (1905), 166 Ind. 239, 76 N. E. 977, 117 Am. St. 382, 9 Ann. Cas. 91, 3 L. R. A. (N. S.) 966; *Farmers Mut. Fire Ins. Co. v. Jackman* (1904), 35 Ind. App. 1, 73 N.

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E. 730; *Supreme Tribe, etc. v. Lennert* (1912), 178 Ind. 122, 98 N. E. 115; *Gray v. National Benefit Assn.* (1887), 111 Ind. 531, 11 N. E. 477; *Globe, etc., Ins. Co. v. Indiana Reduction Co.* (1916), 62 Ind. App. 528, 113 N. E. 425.

If the insurer has no knowledge that such pro-

4. hibited article is being kept or used on the insured premises at the time of the issuance of such policy, but subsequently discovers such fact, it must tender back, or in some appropriate way restore, or offer to restore, to the insured the premium received therefor, within a reasonable time thereafter, in order to avail itself of such defense, and, upon its failure so to do, it will be deemed to have waived the right to declare such policy void, and to have elected to treat it as a valid contract of insurance. *Ohio, etc., Ins. Co. v. Williams* (1916), 63 Ind. App. 435, 112 N. E. 556; *Marion, etc., Bed Co. v. Empire State Surety Co.* (1912), 52 Ind. App. 480, 100 N. E. 882; *Glens Falls Ins. Co. v. Michael, supra*; *Commercial Life Ins. Co. v. Schroyer, supra*; *State Life Ins. Co. v. Jones* (1911), 48 Ind. App. 186, 92 N. E. 879; *Brashears v. Perry County, etc., Ins. Co.* (1912), 51 Ind. App. 8, 98 N. E. 889. This rule is applicable even where the keeping and using of such prohibited article is not discovered until after a loss under such policy has occurred. *American, etc., Ins. Co. v. Rosenstein* (1910), 46 Ind. App. 537, 92 N. E. 380; *Brashears v. Perry County, etc., Ins. Co., supra*; *Masonic, etc., Assn. v. Beck* (1881), 77 Ind. 203, 40 Am. Rep. 295; *Glens Falls Ins. Co. v. Michael, supra*. The knowledge of a general

5. agent of an insurance company of facts material to the risk is the knowledge of the company. *Globe, etc., Ins. Co. v. Indiana Reduction Co., supra*; *West v. National Casualty Co.* (1915), 61 Ind. App. 479, 112 N. E. 115; *Metropolitan Life Ins. Co. v. Wills* (1905), 37 Ind. App. 48, 76 N. E. 560; *Sovereign*

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Camp, etc. v. Latham (1915), 59 Ind. App. 290, 107 N. E. 749. It has also been held in this state

6. that an insurance broker, acting within the scope of his authority, is the agent of the company from which he secures insurance, and his knowledge relating to the risk is binding on the company, though not communicated to it. *Indiana Ins. Co. v. Hartwell* (1890), 123 Ind. 177, 24 N. E. 100; *German Fire Ins. Co. v. Greenwald* (1912), 51 Ind. App. 469, 99 N. E. 1011; *Western Ins. Co. v. Ashby, supra*; *Globe, etc., Ins. Co. v. Indiana Reduction Co., supra*.

Applying these rules of law to the undisputed facts stated, we conclude that the court did not err in giving the jury a peremptory instruction to return a

7. verdict in favor of appellee. Such facts show that the prohibited act was being committed by appellee at the time the policies were issued, and was within the knowledge of the broker through whom appellants secured the risks. If he was the agent of appellants, such knowledge prevents them from subsequently declaring the policies void on that account, and the giving of the peremptory instruction was justified. But if it be said that the existence of such agency was a controverted fact, and therefore a question for the jury, still the giving of the peremptory instruction was not error, as the undisputed facts show that the general agent of appellants, who countersigned the policies, acquired knowledge of the commission of such prohibited act at a time subsequent to the fire, as made it necessary that appellants return, or offer to return, the unearned premiums received for the policies, in order to defend on account of such prohibited act. It therefore follows that in either event appellee was entitled to recover. Since there was uncontradicted evidence, which clearly made out a case on behalf of appellee, and

no evidence which tended to establish a defense to either action, it was entirely proper for the court to instruct the jury to return a verdict for appellee. *Hazzard v. Citizens State Bank* (1880), 72 Ind. 130; *Fowler Utilities Co. v. Chaffin Coal Co.* (1908), 43 Ind. App. 438, 87 N. E. 689; *Haughton v. Aetna Life Ins. Co.* (1905), 165 Ind. 32, 73 N. E. 592, 74 N. E. 613; *Borg v. Larson* (1915), 60 Ind. App. 514, 111 N. E. 201; *Watt v. Mishawaka Paper, etc., Co.* (1913), 53 Ind. App. 682, 99 N. E. 1029; *Dean v. Cleveland, etc., R. Co.* (1917), ante 225, 115 N. E. 92. In doing so the court did not usurp the province of the jury, but simply discharged a duty in the trial of the cause. *Moss v. Witness Printing Co.* (1878), 64 Ind. 125; *Modern Woodmen v. Jones* (1912), 52 Ind. App. 149, 98 N. E. 1006.

It is apparent from what we have said that the second and third reasons assigned as causes for a new trial are not well taken. The fourth reason so

8. assigned cannot be sustained. Some of the errors alleged therein have been waived by appellants' failure to present the same in their
9. brief. Others relate to the admission of evidence with reference to the process of degreasing and the use of gasoline therein. Such evidence was for the evident purpose of showing that appellants had at least constructive knowledge of the use of gasoline on such premises, and was therefore proper. Some objections were made to the exclusion of certain
10. evidence in the nature of conclusions. This was not error. Other objections relate to the exclusion of certain evidence, relating to appellants'
11. knowledge of the use of gasoline on the premises insured, none of which tended to disprove certain undisputed facts, which clearly established such knowledge. The exclusion of such evidence was therefore

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harmless. We find no available error in any of the questions raised by said fourth reason for a new trial.

We may add that this appears to be a kindred case with the cases of *Globe, etc., Ins. Co. v. Indiana Reduction Co.*, *supra*, and *Caledonian Ins. Co. v. Indiana Reduction Co.* (1917), 64 Ind. App. 566, 115 N. E. 596, which are decisive of some of the questions presented on this appeal. We find no reversible error in the record. Judgment affirmed.

NOTE.—Reported in 117 N. E. 273. Insurance: necessity of the return or tender of unearned premium to effect cancellation of fire insurance by insurer, 12 Ann. Cas. 1067, Ann. Cas. 1913D 490, 1917B 910; liability of insurance broker for failure to inform the company that gasoline was kept on premises, 38 L. R. A. (N. S.) 614, 632. See under (1) 19 Cyc 936; (2) 19 Cyc 712; (3, 4) 19 Cyc 817, 819; (4) 19 Cyc 819; (6) 19 Cyc 807.

COLUMBIA SCHOOL SUPPLY COMPANY v. LEWIS.

[No. 9,791. Filed May 11, 1917. Rehearing denied October 9, 1917.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Independent Contractor.*—In an action for an award under the Workmen's Compensation Act, Acts 1915 p. 392, evidence showing that plaintiff was employed by defendant to haul material for it both by the load and by the hour, using either his own wagon or one of defendant's, and that he also worked for others, that the defendant could terminate the employment at any time, that the work he was performing when injured was under the control of defendant, and that at the time of the injury he was using his own transfer wagon, is sufficient to sustain a finding that plaintiff was an employe and not an independent contractor. p. 341.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Findings of Industrial Board.—Review.—Weighing Evidence.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, where there is some evidence to sustain the findings of the board, the court on appeal will not weigh the evidence. p. 341.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Charles Lewis against the Columbia School Supply Company. From an award for applicant, the defendant appeals. *Affirmed.*

McKay, Turner & Merrill, for appellant.

Willard Robertson, for appellee.

IBACH, P. J.—This is an appeal from the award of the full board rendered on review.

The finding of facts filed with the award are as follows: "On the 8th day of July, 1916, plaintiff was in the employment of the defendant at an average weekly wage not exceeding \$10; that on said date he received a personal injury by an accident arising out of and in the course of his employment, resulting in the total, permanent loss of the entire vision of his right eye; that the defendant had actual knowledge of the plaintiff's accident and injury on the day of its occurrence."

In addition to the facts above set out the undisputed evidence shows that appellee had an agreement with the appellant to do hauling for it. He was to furnish his own horse and the company was to pay him seventy-five cents a load to haul down to the depot and fifty cents for hauling to Twenty-First street and thirty cents an hour for hauling around the factory. He was hauling sheet metal around the factory on a single wagon and was pulling in the driveway between two buildings on the premises of the appellant when something was whisked through the air and struck him in the eye. Appellee hauled whenever there was anything to haul. Part of the time he used his own wagon and part of the time the company's wagon. At the time he was injured he was using his own wagon and horse. His wagon had a sign "Transfer" on one side and another sign "Charles Lewis Transfer" on the other side. Ap-

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pellee had others drive his wagon at times. He was required to report at appellant's factory each morning about seven o'clock. "If there was any hauling to do I hauled and if there was not I went back home." Appellee was not to haul for any definite period and could have been discharged at any time. Appellee worked for others after hours. There is other evidence tending to show that appellant had the right, under the employment, to tell appellee "to quit, what to do, and how to do it."

The only question we are called on to consider is the sufficiency of the evidence to sustain the finding of facts

that appellee was an employe of appellant at the

1. time of his injury, and that the injury arose by accident out of and in the course of his employment.

The claim was resisted by appellant on the ground that appellee was an independent contractor. Appellee's work was limited by the right of the company to terminate it at any time, and it was for no definite period or amount. The particular work he was performing when injured was under the control of the company. Under the evidence we cannot say that appellee was an independent contractor. *Tuttle v. Embury-Martin Lumber Co.* (1916), 192 Mich. 385, 158 N. W. 875, 879.

The other legal principles involved in this appeal, in so far as they are controlling, have been discussed and disposed of in the ruling on the motion to dis-

2. miss. *Columbia School Supply Co. v. Lewis* (1916), 63 Ind. App. 386, 115 N. E. 103. There is evidence tending to support the findings objected to, and, while there is evidence in conflict therewith, this court will not weigh the evidence.

Judgment affirmed.

NOTE.—Reported in 116 N. E. 1. Independent contractors, definition, 76 Am. St. 382. Workmen's Compensation Act: who is a

"workman" within meaning of act, Ann. Cas. 1913C 28, 1916B 793, 1918B 704; review of facts on appeal, Ann. Cas. 1916B 475, 1918B 647.

MEEHAN v. EDWARD VALVE AND MANUFACTURING
COMPANY.

[No. 9,876. Filed October 10, 1917.]

1. **MARRIAGE.—Common-Law Marriage.—Validity.—Requisites.**—Although common-law marriages are in derogation of statute, they are recognized as valid and binding where made between parties of contracting capacity by their mutual assent, followed by cohabitation as husband and wife, together with other circumstances essential to the establishment of such a marriage. p. 343.
2. **MARRIAGE.—Common-Law Marriage.—Evidence.—Presumptions.**—To raise a presumption of common-law marriage, the evidence must be clear and convincing, and where there is evidence to negative such a presumption, it must fail. p. 344.
3. **MARRIAGE.—Common-Law Marriage.—Contract.—Evidence.**—In order to consummate a valid common-law marriage, the conduct of the parties must be such as to show an intention to contract marriage and assume the relation of husband and wife, and such a marriage must appear either by the signature of the parties, where the contract is in writing, or by witnesses present when the agreement was made, and, in the absence of such evidence, the relationship may be proved by cohabitation, reputation, conduct, and the acts of the parties with respect to the marriage relation. p. 344.
4. **MARRIAGE.—Common-Law Marriage.—Evidence.—Cohabitation.**—Cohabitation does not of itself constitute a common-law marriage, but is merely evidence of marriage, and, if the cohabitation was originally illicit, it is presumed to have so continued. p. 344.
5. **MARRIAGE.—Common-Law Marriage.—Evidence.**—In a proceeding under the Workmen's Compensation Act, Acts 1915 p. 392, for compensation for the death of a servant, where applicant testified that she had entered into a verbal common-law marriage contract with deceased and that thereafter they lived together for a considerable period of time, but there was also evidence that on one occasion she asserted that she was married to another, that deceased stated that they were not married and that during the time they lived together decedent had an

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undivorced wife living, the evidence is sufficient to warrant a finding that applicant was not married to deceased, especially as §8360 Burns 1914, §5325 R. S. 1881, makes a marriage absolutely void if either party has a wife or husband living at the time of its consummation. p. 345.

6. MASTER AND SERVANT.—*Workmen's Compensation.—Findings by Industrial Board.—Review.*—Where there is sufficient evidence to warrant a conclusion of the Industrial Board on a question of fact, the finding will not be disturbed on appeal. p. 346.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Alice Meehan against the Edward Valve and Manufacturing Company. From a judgment denying compensation, the applicant appeals. *Affirmed.*

George E. Brannan and McMahon & Conroy, for appellant.

Miller & Dowling and Lyman, Adams & Bishop, for appellee.

IBACH, P. J.—On January 19, 1916, John Meehan, an employe of appellee, was killed while engaged in the line of his employment. Appellant, upon the theory that she was the wife and sole dependent of the deceased, filed her application before the Industrial Board for an allowance under §38 of the Workmen's Compensation Act. Acts 1915 p. 392. Her claim was finally rejected by the full board on January 17, 1917, at which time, upon request of appellant, there was a finding of facts wherein all the material facts necessary to an allowance of her claim were found for appellant, except that she was not the wife of the decedent.

The errors complained of relate to the correctness of this finding, so that the decision of this appeal requires a consideration of the single question whether

1. appellant was the wife of decedent, notwithstanding the fact that there was no marriage

ceremony. While common-law marriages are in derogation of our statutes, still such marriages are recognized as valid and binding where made between parties of contracting capacity by their mutual assent, followed by cohabitation as husband and wife, together with such other circumstances as are essential to the establishment of such a marriage. *Compton v. Benham* (1909), 44 Ind. App. 51, 85 N. E. 365. To raise the presumption of marriage by such means, the evi-

2. dence must be clear and convincing, and where there is legal evidence in the record to negative the legal presumption in favor of the marriage and from which a contrary presumption may arise, all former evidence falls or is neutralized. *Klipfel's Estate v. Klipfel* (1907), 41 Colo. 40, 92 Pac. 26, 124 Am. St. 96, 14 Ann. Cas. 1018, and cases cited.

We will not attempt to state the quantum of evidence necessary to the existence of a common-law marriage applicable to all cases. It is sufficient to state

3. that such fact must appear either by the signature of the parties, where the contract is in writing, or by witnesses present when made; and if there is no such evidence, then it may be proved by cohabitation, reputation, conduct, and all other circumstances having to do with the acts and conduct of the parties with respect to the marriage relation. In short, enough must be said and done by the contracting parties to show an intention to contract marriage and assume the relation of husband and wife. Cohabitation does not

4. of itself constitute a common-law marriage. It is merely evidence of marriage, and, if it is illicit in the beginning, it is presumed to continue. *Compton v. Benham, supra*. As bearing upon the same principle of law, see *McKenna v. McKenna* (1899), 180 Ill. 577, 54 N. E. 641.

A careful examination of the evidence in this case

convinces us that §8360 Burns 1914, §5325 R. S. 1881, had much to do with the disposition made of it

5. by the Industrial Board. This section makes a marriage absolutely void where either party has a wife or husband living at the time of such marriage. Appellant testified that she and the deceased "drew up a contract between them that they would live together and be true to one another but it was not in writing, just ourselves were present at the Delmargo Hotel (Chicago). It was about ten o'clock in the evening, Mr. Meehan had made an appointment to meet me on that occasion, that they went together to a bedroom at the hotel and by that means we agreed to become man and wife." She had met deceased but once, about a year before, at a dance at Fox Lake, and that was the only time she had ever seen him before she met him in Chicago. They continued to live together at many different hotels and houses in Chicago, but it is a significant fact that the record nowhere contains any evidence of any neighbors or residents, or of the reputation of appellant and deceased as to marriage in any of the many communities in which they lived. This fact also doubtless had much weight with the Industrial Board, as it is the most usual way of proving marriage in such cases. It appears from the testimony of deceased's father that he visited the parties and found them living together and at one time deceased told him they were not married, and he asked why they did not get married, and deceased remarked that he had been married to two and he would never get married to the third. A sister of the deceased also testified that she met appellant some time after the date of the alleged marriage, when the deceased introduced appellant to her as his friend, Miss Rudolph. She further testified "about two years ago (which was about a year before deceased met his death) my brother was ill, appellant

was not with him at the time. He was working at Reagan's saloon and took sick. I found out my brother was sick and I talked to appellant and told her that Jack was sick and asked her if she would help him and she said, 'No'; she was married to a chauffeur and could do nothing for him."

There is other evidence in the record, independent of that which appellant insists was improperly introduced, to show that during all the time the relations between appellant and deceased were carried on he had a wife living, from whom he had not been divorced. So that a reading of the entire record convinces us that, notwithstanding the testimony given by appellant as to the original marriage agreement, there was then no present intention to assume the relation of husband and wife, at least, the conduct is sufficient to show that the deceased had no such intention as he doubtless knew that his status at that time prevented such a relation with appellant. As was said in *Armstrong v. Industrial Commission* (1915), 161 Wis. 530, 154 N. W. 844: "However innocent the plaintiff may have been, in law her relation with the deceased was an illicit one, and we think it would be neither good law nor good public policy to hold that such a relation established a family relation. * * * What we hold is that living with a man as his wife, when there is no marriage, does not create a family relation within the meaning of the statute." See, also, *Compton v. Benham*, *supra*.

Since the Industrial Board has passed upon the evidence in this case, and has held that appellant was not the wife of the decedent at the time of his death,

6. and since the record contains sufficient evidence to warrant that conclusion, it is not for this court to disturb the conclusion reached by the Industrial Board.

Judgment affirmed.

Waterman v. Riehl—65 Ind. App. 347.

NOTE.—Reported in 117 N. E. 265. Marriage: validity of common-law marriage, L. R. A. 1915E 8, Ann. Cas. 1912D 597, 26 Cyc 836; presumptions in respect to same, 124 Am. St. 118, 26 Cyc 888. Workmen's Compensation Act: review of facts on appeal, Ann. Cas. 1916B 475, 1918B 647, L. R. A. 1916A 163, 266, 1917D 186.

WATERMAN ET AL. v. RIEHL.

[No. 9,864. Filed October 10, 1917.]

MASTER AND SERVANT.—*Workmen's Compensation Act.—Findings of Industrial Board.—Review.*—Under §61 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that an award of the Industrial Board shall be conclusive as to all questions of fact, where the testimony of medical witnesses as to the cause of decedent's death was conflicting, but a part of such testimony sustained the finding of the board, its finding is conclusive on appeal.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Mary Riehl against Oscar C. Waterman and others. From an award for applicant, the defendants appeal. *Affirmed.*

Pickens, Moores, Davidson & Pickens, for appellants.
James E. Rocap, for appellee.

CALDWELL, J.—George Riehl, appellee's deceased husband, was an employe of appellant Waterman. As such, on November 15, 1915, he was assisting in wrecking a building in Indianapolis, whereupon he fell to the ground from some part of the structure, whereby he suffered serious physical injury. The matter having been properly brought before the Industrial Board, Waterman and Riehl, under the terms of §57 of the Workmen's Compensation Act (Acts 1915 p. 392), agreed in writing respecting the amount of compensation that should be paid to the latter. This agreement was filed with and approved by the Industrial Board.

It was to the effect that, in addition to medical bills incurred on account of the injury within the first thirty days thereafter, Waterman should pay to Riehl, beginning November 30, 1915, \$7.79 per week during the disability caused by his injuries, but not extending beyond the period of 300 weeks prescribed by the act. Riehl died April 23, 1916. No payments were in arrears at that time. On September 7, 1916, appellee, as dependent widow, on the theory that her husband's injuries caused or hastened his death, filed with the board her application for an adjustment of her claim, based on such theory. Waterman's insurance carrier became a party to the proceeding. On a hearing the board awarded appellee, in addition to \$100 burial expenses, 280 weeks' compensation at \$7.79 per week. In fixing the duration of the compensation, the board, as required by §37 of the act, *supra*, deducted from the prescribed period of 300 weeks the number of weeks for which payments had been made to Riehl under such agreement. Waterman and the insurance carrier have appealed, challenging only the sufficiency of the evidence to sustain the award.

It is contended by appellants, and conceded by appellee, that the immediate cause of decedent's death was a diseased condition known as cirrhosis of the liver. It is appellants' contention, however, that such ailment as an independent malady resulted in Riehl's death, while appellee contends that decedent's injury produced such diseased condition, and that the diseased condition so produced caused her husband's death. The board found against appellants' contention, and specifically found that decedent's injuries resulted in his death. The testimony of a number of medical witnesses was brought to bear upon the question in controversy. A part of such medical testimony sustains the finding of the board; much of it is otherwise. The case then pre-

sents a situation where there is merely a conflict in parol evidence. Under such circumstances, the question of fact whether decedent's injuries resulted in his death was for the determination of the board, and the board's finding being sustained by some evidence, this court has no jurisdiction to review the action of the board. §61 Workmen's Compensation Act, *supra*; *In re Carroll* (1917), *ante* 146, 116 N. E. 844; *Columbia School Supply Co. v. Lewis* (1917), *ante* 339, 116 N. E. 1; *In re Meyers* (1917), 64 Ind. App. 602, 116 N. E. 314; *Bloomington, etc., Stone Co. v. Phillips* (1917), *ante* 189, 116 N. E. 850; *Gorski's Case* (1917), 227 Mass. 456, 116 N. E. 811; *Dietzen Co. v. Industrial Board* (1917), 279 Ill. 11, 116 N. E. 684; *Big Muddy Coal Co. v. Industrial Board* (1917), 279 Ill. 235, 116 N. E. 662.

Award affirmed.

NOTE.—Reported in 117 N. E. 272. Workmen's Compensation Act: review of facts on appeal, see note *ante* 347.

IN RE MCCASKEY.

[No. 10,023. Filed October 10, 1917.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Workmen's Compensation Act.—Medical Expenses.—Employer's Liability.*—Under §25 of the Workmen's Compensation Act, Acts 1915 p. 392, requiring an employer to furnish a physician for an injured employe only during "the thirty days after an injury," where an employe received no apparent injury at the time of an accident, but after the expiration of the thirty-day period an injury developed from such accident which required medical attention, a physician who was called to render the necessary medical services was entitled to have his claim allowed for services rendered within thirty days after the development of the injury, since under the act the date of the injury and not of the accident fixes the time when the employer's liability for physician's services begins. p. 351.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Findings by Industrial Board.*—The Industrial Board's determina-

tion of a question of fact is conclusive on appeal, where there is any evidence to support it. p. 355.

From the Industrial Board of Indiana.

Certified questions of law.

Proceedings under the Workmen's Compensation Act in the matter of one McCaskey. Questions of law certified by the Industrial Board. *Questions answered.*

HOTTEL, C. J.—The Industrial Board has certified to this court for its decision and determination under §61 of the Workmen's Compensation Act (Acts 1915 p. 392) certain questions of law based on the following facts as certified to by said board:

On February 17, 1916, Lewis Grabhorn, hereinafter referred to as "G," was in the service of the Cotton-Wiebke Company, hereinafter referred to as "the company," as an employe at an average weekly wage of \$18, and while in the discharge of his duties in such employment on said day was accidentally struck in the forehead with a sledge hammer by one of his coemployes. Said company is a corporation, and its president and manager was present at the time of and witnessed said accident. The blow of the hammer made an abrasion on the forehead of G but made no visible physical wound that required medical or surgical treatment. G continued his work in the belief that he had received no physical injury until and including March 18, 1916, when in the evening, and after the completion of his work on that day, he was taken with a violent pain in his forehead, of which fact his employer was immediately notified. The pain continued throughout the night and on the following day, March 19, Charles M. McCaskey, a licensed and practicing physician and surgeon of the city of Indianapolis, was called. Said physician responded to said call, visited G and examined him and, on March 20, diagnosed G's trouble as an ab-

success in the right frontal sinus, which required a surgical operation in order to open and drain the same. On the same day, March 20, said physician put G under an anesthetic, and drained the right frontal sinus, and continued his treatment for about ten days, when G was so far recovered that he required no further surgical or medical attention. G's said abscess, as conceded by the company, was the direct result of the blow of the sledge hammer received on his head on February 17, 1916. The physician presented a claim for \$50 for his services, which the company concedes to be reasonable and proper as against G, considering his standard of living.

Upon these facts we are asked to determine and decide whether, under the act in question, said physician is entitled to have his claim approved by the Industrial Board.

It appears from the brief of said board, accompanying said certified question, that the company, through the insurance carrier, contends that said claim

1. should not be approved for the reason that the services for which it is filed were all rendered more than thirty days after February 17, 1916. In support of its contention, said carrier relies on the provisions of §25 of the act, *supra*, which *requires* an employer to furnish a physician only during "the thirty days after an injury." It will be observed that in the language just quoted the "*injury*," and not the *accident*, is the thing designated as controlling in determining when the duty to furnish a physician begins and ends, and it will also be observed that throughout said entire act the *injury*, and not the *accident*, is treated not only as the condition upon which liability arises, but its date fixes the date upon which liability begins, and from which the period of its continuance must be ascertained, and the time for giving notices, etc. §§25, 27, 30, 57, 67, *supra*. The use of the word "*injury*" instead of

"accident" in these various sections of the act is, we think, significant. It comports with the spirit and purpose of the act, in that it makes liability and compensation, and the time of the beginning and ending of each depend on the actual injury, or the result, rather than on the accident, or the cause.

In our examination of this question, we have found no case that supports the contention of the insurance carrier, but, on the contrary, we have found several cases in other jurisdictions, where statutes containing language very similar to that of our act, *supra*, were given the interpretation which we have indicated should be given to our act.

Section 7, Connecticut Acts 1913, ch. 138, p. 1737, provides that: "The employer shall provide a competent physician or surgeon to attend any injured employee during the thirty days immediately following the injury as such injury may require, and in addition shall furnish such medical and surgical aid or hospital service, during such thirty days, as such physician or surgeon shall deem reasonable or necessary. * * *" In the case of *Barton v. New York, etc., R. Co.*, 1 Conn. Comp. Dec. 227, this act came up for interpretation before the Connecticut board of compensation commissioners. The facts in that case were in substance as follows: Barton, while at work for the railroad company on February 25, 1913, scratched the palmer surface of his hand on the sharp edge of a stone which he was removing from the railroad company's track. He paid no attention to the scratch, considering it of no consequence. On March 7 or 8, the hand began to pain him, and on the 16th he consulted a physician, who diagnosed his condition as blood poisoning due to the scratch, and sent him to a hospital where he was treated until April 24. He had a bad case of infection, the septic condition extending to his elbow, and he was

compelled to undergo several minor operations, but for which he was in danger of losing his arm, if not his life. The board, following *Johnson's Case* (1914), 217 Mass. 388, 104 N. E. 735, and *Hurle's Case* (1914), Id. 223, 104 N. E. 336, L. R. A. 1916A 279, Ann. Cas. 1915C 919, held that the thirty-day period should be computed from March 16, which was held to have been the date of the injury for the purposes of such computation.

Massachusetts Acts 1911, ch. 751, part 2, §5, provides that: "During the first two weeks after the injury, the association shall furnish reasonable medical and hospital services, and medicines when they are needed." In *Johnson's Case*, *supra*, the court was asked to construe said statute in a case, the facts of which were in substance as follows: Johnson had suffered from lead poisoning, but had had no recurrence of the disease for fourteen years until he became incapacitated for work on or about March 13, 1913. The board found that he had absorbed lead poisoning since July 1, 1912, and that the date when the accumulated effects of this poisoning manifested itself, and Johnson became sick and unable to work, was the date of the injury. In that case, the court held that under such finding, the board was warranted in finding that the injury was received when he became sick and unable to perform labor. "Until then," said the court, "he had received no 'personal injury,' although doubtless the previous absorption of lead into his system since July 1, 1912, finally produced the conditions which terminated in the injury."

As supporting, or tending to support, the same conclusion, see, also, *In re Hart*, Mich. Indus. Acc. Bd., Bul. No. 3, p. 18; Honnold, *Workmen's Compensation* 713, §198.

Independently of the cases cited, the interpretation which we have indicated as the one to be given to that part of the Workmen's Compensation Act here involved is in harmony with the entire act, and with the general spirit and purposes, as well as with the economic policy which prompted it.

This court has, in the case of *In re Bowers* (1917), ante 128, 116 N. E. 842, said that by the act in question the legislature did not intend "to narrow the rights of an injured employe, but rather that the rights and remedies afforded by the act, while not circumscribed by such limits, should extend to all situations wherein, were there no workmen's compensation act, an injured employe would have his remedy at common law for injuries received, and the act should be so construed where its language reasonably admits of such construction; the general purpose of the act being to substitute its provisions for pre-existing rights and remedies."

Under the facts of this case, G, at common law, in an action for damages for his injuries based on negligence, would have been entitled, as one of the elements of his damage, to the expense he incurred for medical and surgical services necessary to the proper treatment of such injuries. By the act involved, the legislature expressly recognizes a portion of such services as a proper element of compensation to an injured employe. The language of the statute, and justice and reason alike, authorize the conclusion that the services of an attending physician for which compensation was intended was a service to be rendered after there was an actual known physical injury, and hence where, as in this case, the undisputed facts show an accident to an employe in the presence of his employer, the immediate effects of which are not such as to indicate to either employer, or employe, any disability within the

meaning of the act in question or any injury requiring the services of an attending physician as provided in said act, and such physician is, at the time, neither asked for nor called by the employe, nor furnished by the employer, and it turns out later that the injury resulting from such accident is more serious than was at first thought, and is in fact such as results in a disability of the employe within the meaning of the statute here involved, the thirty-day period during which the employer must, under said §25, of this act, *supra*, furnish an attending physician begins to run when the disability to the employe within the meaning of the act in question develops from such injury.

It follows that under the facts certified to us by the Industrial Board, such board is, by the act in question, given authority to approve said physician's

2. claim, and, assuming that the facts above indicated are undisputed, this court would say as a matter of law that said claim should be allowed. However, the question of when an injury occurred, like any other question of influence in determining whether a claim should be allowed by the Industrial Board, is, ordinarily, a question of fact to be determined by such board from all the evidence before it, and its determination thereof, where it has any evidence for its support, will be conclusive on this court.

NOTE.—Reported in 117 N. E. 268. Workmen's Compensation Act: review of facts on appeal, see note *ante* 347; allowances for medical services to injured employe under act, L. R. A. 1917D 178.

UNITED PAPERBOARD COMPANY v. LEWIS.

[No. 9,865. Filed October 11, 1917.]

1. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Workmen's Compensation Act.*—*Disease by Accident.*—Where a factory employe, whose duty was to keep the factory basement clean, was directed to flush into a sewer with a stream of hot water a quantity of steaming pulp which had been dumped on the basement floor because of the breaking of a pipe, and in performing the work he became overheated and took a chill on the way to his home, and soon afterwards acute nephritis manifested itself, the Industrial Board was warranted in finding that the breaking of the pipe created an unusual condition under which the employe was required to render a service outside the line of his ordinary duties, resulting in enforced exposure, and nephritis, having been contracted as a direct result of the unusual circumstances of the employment, was a personal injury by accident within the provisions of the Workmen's Compensation Act, Acts 1915 p. 392, the rule being that diseases by accident, within the meaning of workmen's compensation acts, are those which cannot be reasonably anticipated as an ordinary result of the employe's work, but are contracted as a direct result of unusual circumstances connected therewith. p. 359.
2. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Workmen's Compensation Acts.*—*Construction.*—*Accident in Course of Employment.*—The words "by accident arising out of and in the course of the employment," as used in workmen's compensation acts, should be given a broad and liberal construction, and an injury is received in the course of the employment when it comes while the workman is performing the duty for which he is employed, and it arises out of the employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work was required to be performed and the resulting injury. p. 361.
3. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Workmen's Compensation Act.*—*Accident Arising Out of and in Course of Employment.*—*Evidence.*—*Sufficiency.*—In a proceedings for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, evidence showing that a factory employe, whose ordinary duty was to keep the factory basement clean, was ordered to flush into a sewer with a stream of hot water a quantity of steaming pulp which had been dumped on the basement floor because of the breaking of a pipe, that in

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performing the work the employe became overheated and wet with perspiration, with the result that, when he came into contact with the open air while on his way from work to his home, he took a chill and nephritis subsequently developed, is sufficient to support a finding that the nephritis arose both out of and in the course of the employment within the terms of the act. p. 362.

4. MASTER AND SERVANT.—*Injuries to Servant.—Accident Growing Out of Employment.—Negligence.*—In a proceedings for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, the fact that claimant, after becoming overheated and wet with perspiration while flushing a quantity of hot pulp out of a basement, voluntarily exposed himself in the open air on his way home after work and took a chill would not be a defense under the act to a claim for compensation for nephritis following the chill, because where the primary injury arises out of the employment, every consequence which flows from it likewise arises out of the employment, and, though claimant's conduct was negligent, it could not defeat his right to compensation, since mere negligence is not a defense to such a claim. p. 363.
5. MASTER AND SERVANT.—*Workmen's Compensation Act.—Awards.—Review.—Evidence.—Admissibility.*—The Industrial Board, created by the Workmen's Compensation Act, Acts 1915 p. 392, is not a court, but an administrative body, and should not be held to strict rules governing the admission of evidence, and the admission of incompetent evidence will not operate to reverse an award, if there is evidence to support it. p. 364.
6. MASTER AND SERVANT.—*Workmen's Compensation Act.—Awards.—Review.—Evidence.—Weight and Sufficiency.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, where there is competent evidence to support the decision of the Industrial Board, the court on appeal cannot pass upon its weight and sufficiency. p. 365.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Amberson Lewis against the United Paperboard Company. From an award for applicant, the defendant appeals. *Affirmed.*

John B. Coughlin, for appellant.

Switzer & Bent, for appellee.

BATMAN, J.—Appellee filed his claim against appellant, before the Industrial Board of Indiana, under the

Workmen's Compensation Act, Acts 1915 p. 392, alleging that on August 7, 1916, he received personal injuries by reason of an accident arising out of and in the course of his employment by appellant in the city of Wabash, Indiana. On a hearing before the full Industrial Board, an award was adjudged in favor of appellee, from which appellant prosecutes this appeal.

Appellant, under its assignment of errors, urges that the award of the Industrial Board is contrary to law, and not sustained by sufficient evidence. The evidence tends to establish the following facts: Appellee is married, and has two minor children. On August 7, 1916, he was in the employ of appellant as "cellar boy." His duties were to keep the place clean. He was in good health when he went to work on the morning of said day. There were about two big wagonloads of steaming pulp in the basement room, where he was required to work on said day, that had run out of a broken iron pipe through which it was conducted, onto the cement floor of such room. Appellee's foreman directed him to remove the pulp by flushing it out into the sewer with water. To do this he was required to use a hose, through which hot water from the exhaust of the engine was forced. He was compelled to hold the hose in his hands in directing the flow of hot water against the pulp. It became so hot that he had to wrap it with a cloth in order to hold it. He began this work about eight o'clock in the morning and finished it in about three and a half hours. During such time he was compelled to stand in the heated pulp, inhale the steam, and smell the odor which it gave off. By reason of the heat of the pulp and water his working place became extremely hot. He perspired profusely, and his clothes thereby became thoroughly wet. The perspiration from his body ran down into his rubber boots, until they were very wet on the inside, and

his feet became extremely hot from the pulp and water. When he had completed this work he went home to get his dinner. On his way home he began to chill, and continued to chill for several days. On reaching home he changed his clothes. He felt stiff the next day. Soon afterwards acute nephritis manifested itself, which confined him to his bed for about eight weeks, and from the effects of which he has not fully recovered. His affliction resulted from the conditions described, and has caused disability for work.

The Workmen's Compensation Act, *supra*, of this state makes provision for the payment of compensation for personal injury or death by accident to an

1. employe, arising out of and in the course of his employment. Appellant first contends that the evidence shows that the disability of which appellee complains is the result of a disease, and not of an accident within the meaning of the act. Repeated efforts have been made to define an "accident" as used in similar acts in various jurisdictions, but the definitions are not uniform. One frequently approved defines an accident to be "an unlookedfor mishap, an untoward event which is not expected or designed." The courts have also differed as to whether a disease following an employment should be considered an injury by accident within the meaning of such acts. In the various decisions on this subject it is generally recognized that diseases are of two classes: First, the so-called industrial or occupational diseases, which are the natural and reasonably to be expected results of a workman following a certain occupation for a considerable period of time; second, diseases which are the result of some unusual condition of the employment. The first class is illustrated by lead poisoning, and the second by pneumonia following an enforced exposure. As a rule such industrial or occupational diseases are not considered

injuries by accident, and in the absence of special statutory provision compensation is not allowed therefor. On the other hand it is generally accepted that a disease which is not the ordinary result of an employe's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, is to be considered an injury by accident, and comes within the provisions of acts providing for compensation for personal injury so caused. *Adams v. Acme White Lead, etc., Works* (1914), 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A 283, and note 290, Ann. Cas. 1916B 689; *Glasgow Coal Co. v. Welsh* (1916), Ann. Cas. 1916E 161; 1 Bradbury, *Workmen's Compensation* (2d ed.) 349, 350, 363, 371; 1 Honnold, *Workmen's Compensation* §97; C. J., *Workmen's Compensation Acts* (1917) 64-67; *Hurle's Case* (1914), 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A 279, Ann. Cas. 1915C 919; *Larke v. John Hancock, etc., Ins. Co.* (1916), 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E 584; *McPhee's Case* (1915), 222 Mass. 1, 109 N. E. 633; *Bayne v. Riverside Storage, etc., Co.* (1914), 181 Mich. 378, 148 N. W. 412; *Rist v. Larkin* (1916), 156 N. Y. Supp. 875; *Sheeran v. Clayton & Co.*, 3 B. W. C. C. 583; *Kelly v. Auchenlea Coal Co.*, 4 B. W. C. C. 417; *Alloa Coal Co. v. Drylie*, 6 B. W. C. C. 398; *Brown v. Watson*, 7 B. W. C. C. 259; *Barbeary v. Chugg*, 8 B. W. C. C. 37.

In the instant case it is clearly apparent that appellee contracted the disease which caused the disability for which he seeks compensation as the direct result of an unusual circumstance connected with his employment. His duties required him to keep the basement room clean, but this did not ordinarily require him to flush hot, steaming pulp into the sewer with hot water from the exhaust of the engine. It is evident that this was

only required when the iron pipe through which such pulp was conducted broke and allowed it to escape to the floor. Hence the Industrial Board may have very properly found that the breaking of the pipe created an unusual condition under which appellee was required to work at the time in question, resulting in enforced exposure. In such event, any disease, of which such exposure is shown to have been the cause, may properly be said, under the rule stated, to constitute a personal injury by accident, and to come within the provisions of the Workmen's Compensation Act of this state.

Appellant further contends that, even if the court should find that appellee is suffering from a personal injury by accident, still he would not be entitled to an award of compensation therefor, as the evidence fails to show that such injury arose both out of and in the course of his employment. The statute makes these two features essential to such an award, and this contention calls for our consideration. It may be

2. well to observe that the courts are practically unanimous in holding that the words "by accident arising out of and in the course of the employment," as used in workmen's compensation acts, should be given a broad and liberal construction in order that the humane purpose of their enactment may be realized. *Holland, etc., Sugar Co. v. Shraluka* (1917), 64 Ind. App. 545, 116 N. E. 330, and the authorities there cited. Their meaning, when so used, has been frequently considered in various jurisdictions having such acts, and it is generally accepted that an injury is received in the course of the employment, when it comes while the workman is performing the duty for which he is employed, and that it arises out of the employment, when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal con-

nection between the conditions under which the work was required to be performed and the resulting injury. *McNicol's Case* (1913), 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306; *Ohio Bldg. Vault Co. v. Industrial Board* (1917), 277 Ill. 96, 115 N. E. 149; *Mann v. Glastonbury Knitting Co.* (1916), 90 Conn. 116, 96 Atl. 368, L. R. A. 1916D 86; C. J., Workmen's Compensation Acts (1917) 72; *Rayner v. Sligh Furniture Co.* (1914), 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A 22, and annotation on pages 40 and 232, Ann. Cas. 1916A 386; *Archibald v. Compensation Commissioner* (1916), 77 W. Va. 448, 87 S. E. 791, L. R. A. 1916D 1013; *Larke v. John Hancock, etc., Ins. Co. supra*; *Kunze v. Detroit Shade Tree Co.* (1916), 192 Mich. 435, 158 N. W. 851, L. R. A. 1917A 252; *Matter of Heitz v. Ruppert* (1916), 218 N. Y. 148, 112 N. E. 750, (N. Y.) L. R. A. 1917A 244; *Holland, etc., Sugar Co. v. Shraluka, supra*, and authorities there cited.

We have held that the evidence was sufficient to warrant the board in finding that appellee was suffering from an injury by accident, and from a consider-

3. ation of the rule above stated and the authorities cited it is quite apparent that there was evidence to warrant the further finding that such injury arose out of and in the course of his employment. There was evidence which tended to show that the accident which caused the injury was the overheating described, and that it occurred while appellee was performing the duty required of him in the basement room, in flushing the hot, steaming pulp into the sewer. Under such circumstances it is clear that the injury was received in the course of his employment. There was also evidence which tended to show that the enforced exposure in the basement room under the unusual conditions first caused appellee to become overheated; that while thus overheated he came into contact with the open air which

caused him to chill for several days, and that as a final result of such overheating the disease of acute nephritis developed, causing the disability for which he claims compensation. Such evidence furnished a sufficient basis for finding a causal connection between the conditions under which the work was required to be performed, and the resulting injury. In such event the board was warranted in finding that appellee's injury arose out of his employment.

But appellant contends that the evidence shows that appellee's disease was the result of a chill, brought on by voluntary exposure, while on his way home,

4. after his employment had ceased, and that therefore he is not entitled to compensation. This contention cannot be sustained. It is well settled that where the primary injury arises out of the employment, every consequence which flows from it likewise arises out of the employment. *Larke v. John Hancock, etc., Ins. Co., supra*; *In re Loper* (1917), 64 Ind. App. 571, 116 N. E. 324; *McNicol's Case, supra*; *Burn's Case* (1914), 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916 A 787; *McPhee's Case, supra*; *Reithel's Case* (1915), 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A 304; *Qunze v. Detroit Shade Tree Co., supra*; *Coronado Beach Co. v. Pillsbury* (1916), 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F 1164; *City of Milwaukee v. Industrial Commission* (1915), 160 Wis. 238, 151 N. W. 247. In the instant case the evidence tends to show that the primary injury was the overheating; that it was caused by an enforced exposure connected with the employment; that the subsequent chill and the resultant disease flowed directly from it; and hence, under the rule just stated, the board would have been warranted in finding that the ultimate injury, manifesting itself in such disease, arose out of the employment. The claim that appellee brought on the chill by

voluntary exposure is without merit. If such fact were conceded, it could not defeat appellee's right to compensation, even if it could be said that such exposure was an act of negligence which contributed to his injury. Mere negligence is not a ground of defense to a claim for compensation under the act in question, and there is no suggestion of wilfulness in appellee's conduct. The fact that appellee did not chill until he had ceased work and left appellant's premises is of no consequence under the attendant facts, since it is apparent that the chill was primarily caused from a condition of appellee's body, created by the enforced exposure in the performance of the duties required of him on appellant's premises under his employment.

[Appellant also bases error on the admission of certain evidence. In doing this, it seeks to apply the strict

rules in that regard, adopted and enforced in

5. courts of law. This should not be done. The Industrial Board is not a court, but an administrative body, and should not be held to the same strict rules with respect to the admission of evidence. The general rule seems to be that the admission of incompetent evidence by such boards will not operate to reverse an award, if there be any basis in the competent evidence to support it.) *First Nat. Bank v. Industrial Commission* (1915), 161 Wis. 526, 154 N. W. 847; *Fitzgerald v. Lozier Motor Co.* (1915), 187 Mich. 660, 154 N. W. 67; *Pigeon's Case* (1913), 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A 737; *Reck v. Whittlesberger* (1914), 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C 771; C. J., Workmen's Compensation Acts (1917) 124. This rule is in accord with the spirit of our statute with reference to the powers and duties of the Industrial Board, and its application in the instant case would render any such alleged error harmless.

A further question has been raised as to the suffi-

ciency of the evidence to sustain the award. The rule in this regard is that if there be competent or
 6. legal evidence to support the decision of the board, it is not within the province of this court to pass upon its weight or sufficiency. *In re Meyers* (1917), 64 Ind. App. 602, 116 N. E. 314; *Columbia School Supply Co. v. Lewis* (1916), 63 Ind. App. 386, 115 N. E. 103, Id., *ante* 339, 116 N. E. 1; *Interstate Iron, etc., Co. v. Szot* (1916), 64 Ind. App. 173, 115 N. E. 599; *Chicago Dry Kiln Co. v. Industrial Board* (1917), 276 Ill. 556, 114 N. E. 1009; *Savage's Case* (1915), 222 Mass. 205, 110 N. E. 283.

An examination of the record in this case discloses that there is competent evidence tending to establish every material fact necessary to sustain the award, which is all that is required under the rule stated. Finding no available error in the record, the award is affirmed.

NOTE.—Reported in 117 N. E. 276. Workmen's Compensation Act: (a) compensation for injuries arising out of and in the course of the employment within the meaning of act, L. R. A. 1916A 40, 232, 1917D 114, 1918F 896, Ann. Cas. 1913C 4, 1914B 498, 1918B 768; (b) what constitutes an "accident" or personal injury under the act, L. R. A. 1916A 29, 227, 1917D 103, Ann. Cas. 1915C 921, 1918B 362; (c) disease as an accident, 2 Ann. Cas. 140, 15 Ann. Cas. 886, Ann. Cas. 1918B 309; (d) negligence precluding recovery, Ann. Cas. 1913C 17; (e) review of facts on appeal, see note *ante* 347.

BENEDICT v. BUSHNELL.

[No. 9,606. Filed October 11, 1917.]

1. ADVERSE POSSESSION.—*Elements.*—*Burden of Proof.*—To support a claim of title by adverse possession, the possession must be hostile under a claim of right, actual, open and notorious, exclusive and continuous, and, in an action to quiet title predicated ownership on adverse possession, each of the elements necessary to such possession is an independent ultimate fact, the burden of showing which is on the party asserting such a title. p. 368.

2. **TRIAL.**—*Special Findings.*—*Failure to Find.*—*Effect.*—In an action to quiet title predicated on adverse possession, the absence of a finding of any one of the elements of possession necessary to title by adverse possession is fatal to the cause of action, since the failure to find will be construed as an adverse finding. p. 368.
3. **APPEAL.**—*Review.*—*Findings of Fact.*—*Evidence.*—*Sufficiency.* Where there is evidence to support the trial court's findings of fact, they will not be disturbed on appeal. p. 368.

From Elkhart Circuit Court; *James S. Drake*, Judge.

Action by Joseph Benedict against Grant B. Bushnell. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

James S. Dodge, for appellant.

Perry L. Turner and *Willard H. Chester*, for appellee.

IBACH, P. J.—This is a suit to quiet title to a certain strip of land in the city of Elkhart, Indiana, appellant (plaintiff below) basing his rights and ownership on adverse possession. Issues were formed by complaint, answer in general denial and cross-complaint by appellee asking that his title be quieted to the same real estate with answer in general denial thereto.

At request of the parties the court made a special finding of fact and stated its conclusions of law thereon, such conclusions being in favor of appellee. The court finds in substance that appellant is and has been the owner of lot No. 91 since January 12, 1889; that appellee is the owner of the north half of lot No. 87 by complete record title running back to the government, unless appellant has gained title to a strip of land eight and one-fourth feet wide off the north end of said lot by adverse possession. Said lots are bounded on the north by Maple Row street, on the west by Liberty street and on the south by Laurel street. No public alley was platted or ever existed between said lots, and they were five rods in width east and west. Prior to 1889 the

lots in question were unimproved vacant lots, without any monuments showing any boundaries. In 1890 appellant built a dwelling house on the north end of lot No. 91, and has lived there continuously ever since. From the date last mentioned to 1901 appellant planted garden on the south end of said lot No. 91, "extending on the north end of lot 87, some years planted eight feet three inches south of the south line of lot 91, and some years a part of said disputed strip of eight feet and three inches." In 1893 appellant built a sidewalk on Liberty street along the frontage of lot No. 91 and constructed said sidewalk south of the south line of lot No. 91 a distance of eight feet and three inches; that said sidewalk has remained at said place ever since that time. In 1901 appellant built a house on the south end of lot No. 91, the south line of which was between two and four feet north of the south line of lot No. 91 and graded on the south side of said house to a point four or five feet south of the south line of said house. This house has been occupied by tenants of appellant since the date of its erection to the present time. The tenants mowed the grass on the south end of lot No. 91 and also south of the south line of said lot a distance of eight feet and three inches. Twelve or thirteen years ago appellant planted fruit trees on the disputed strip, also a rose bush. A cherry tree and rose bush are still on said strip. Clothesline posts were also placed on said strip and were used by the tenants of appellant. One year the wife of the last tenant planted some flowers on the disputed strip. The last tenant has occupied the tenant house for five years. He was not informed by appellant at the time he leased the property as to the location of appellant's south line, but mowed the grass on the disputed strip each year that he occupied the premises. In June, 1911, the son of the

then owner of the record title of lot No. 87 mowed and cleaned the weeds off the disputed strip once. Taxes and special assessments were paid by the respective owners of the lots to which each held the record title. All of said acts of appellant were done without the consent of the owners of lot No. 87, and done under a claim of ownership by appellant. The owners of lot No. 87 had no actual notice of the acts done by appellant or his claim herein until the filing of the complaint.

Upon the above facts, most of which are evidentiary only, we are asked to declare as a matter of law that

appellant is the owner of the disputed strip of

1. ground by adverse possession. Title by adverse possession is established when it is shown that the possession is (1) hostile under claim of right; (2) that it is actual; (3) that it is open and notorious; (4) that it is exclusive; and (5) that it is continuous. *McBeth v. Wetnight* (1914), 57 Ind. App. 47, 106 N. E. 407; *Rennert v. Skirk* (1904), 163 Ind. 542, 72 N. E. 546; *May v. Dobbins* (1905), 166 Ind. 331, 77 N. E. 353; *Tolley v. Thomas* (1910), 46 Ind. App. 559, 93 N. E. 181. Each of the above elements was an independent ultimate fact, the burden of which was upon appellant to show. The absence of a finding of one or

2. more of said elements was fatal to appellant's cause of action, for in such case the failure to find will be construed as a finding against him. *Webb v. Rhodes* (1901), 28 Ind. App. 393, 396, 61 N. E. 735; *Carnahan v. Shull* (1913), 55 Ind. App. 349, 102 N. E. 144; *Belshaw v. Chitwood* (1895), 141 Ind. 377, 40 N. E. 908.

There is no finding that appellant had exclusive possession, or that his possession was continuous for the statutory period so as to ripen his title by pre-

3. scription. On the other hand there is ample evidence to sustain appellee's title and the court,

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with all the evidence before it, having found for appellee, we cannot disturb its finding.

Judgment affirmed.

NOTE.—Reported in 117 N. E. 502. Adverse possession: hostility as essential element, 15 L. R. A. (N. S.) 1192, 2 C. J. 262, 263; color of title as an element, proof, 88 Am. St. 702.

INDIANAPOLIS ABATTOIR COMPANY v. COLEMAN ET AL.

[No. 9,961. Filed October 23, 1917.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Workmen's Compensation Act.—Review of Award.—Sufficiency of Evidence.*—In a proceedings for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, where there is evidence tending to show that the employe was in reasonably good health prior to his injury, and undisputed evidence to show that he was rendered unconscious by falling from a stairway as he was about to enter the employer's premises to begin work, the fall being caused by the knob coming off a door he was attempting to open, that after the injury he was taken to his home and did not resume his employment for about a week, that after working a few days he became totally disabled, and that previously to his injury he had been able to work continuously for a long period of time, such evidence is sufficient to warrant the inferences necessary to sustain the Industrial Board's award for total disability due to the injury alleged. p. 371.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Industrial Board's Findings.—Conclusiveness.*—Where the evidence on a question of fact is conflicting, the finding of the Industrial Board is conclusive. p. 372.
3. MASTER AND SERVANT.—*Injury to Servant.—Workmen's Compensation Act.—Right to Award.—Acceleration of Latent Disease.*—In a proceedings by an injured servant for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, the fact that the employe was afflicted with a latent disease which the injury accelerated to a stage of total disability, would not of itself prevent an award of compensation for total disability due to the injury. p. 372.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Construction.—Degrees of Disability.*—The doctrine of the degree

of disability prior to the injury, degree of disability caused entirely by the injury, degree of disability caused entirely by disease, and degree of disability which might have resulted from the disease alone has no application to proceedings for relief under the Workmen's Compensation Act, Acts 1915 p. 392. p. 372.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Mabel Coleman and others against the Indianapolis Abattoir Company. From an award for applicants, the defendant appeals. *Affirmed.*

Taylor, Carter & Wright, for appellant.

Joseph W. Hutchinson, for appellees.

BATMAN, J.—William Coleman, now deceased, filed his claim against appellant before the Industrial Board for compensation under the Workmen's Compensation Act, Acts 1915 p. 392. On a hearing before the full board he was awarded compensation at the rate of \$8.25 per week during the period of his total disability, not exceeding 500 weeks. From this award appellant appealed, and on the death of the said William Coleman, his next of kin dependent on him for support were substituted as appellees. The sole question presented by this appeal relates to the sufficiency of the evidence. Appellant seeks to avail itself of the rule that places the burden of proof in compensation cases on the claimant, and requires that he establish a line of causation from his employment to his injury, and from the injury to his disability, before he can recover. It asserts that the said William Coleman failed to discharge this burden of proof, and hence the award of the Industrial Board was unauthorized.

On the hearing before the full board the following undisputed facts appear to have been established: The said William Coleman was in the employ of appellant at the time of the alleged accident at an average weekly

wage of \$15. On the morning of July 3, 1916, he undertook to open a door on appellant's premises, in order to enter the building to begin his work. He was standing in front of the door, on the third step, when he took hold of the knob to open it. The knob came off and he fell backwards to the ground. The fall rendered him unconscious for a few minutes. He was alone at the time and endeavored to get up, but was unable to do so. Soon a watchman came along and helped him up. He was first taken to the office, and afterwards sent home in a buggy. He resumed his work on July 9, 1916, and continued to work until the 16th day of said month, when he was compelled to cease working because of total disability, which continued until his death. He had previously fallen in June, 1915, and soon thereafter ceased work for sixteen weeks because of sickness. He then resumed and continued his work until the time of the alleged accident under consideration. In addition to these undisputed facts there was conflicting evidence as to whether the said William Coleman was afflicted with syphilis at the time of such alleged accident.

Appellant contends that the evidence fails to show, save by inference, that the said William Coleman suffered an accidental injury arising out of and in

1. the course of his employment, or that his total disability for work was proximately caused by such an injury. If this contention be admitted, still we would not be justified in setting aside the award of the Industrial Board, if the facts and circumstances disclosed by the evidence would warrant such inferences. There was evidence tending to prove that the said William Coleman had been in reasonably good health prior to the accident in question. This evidence, taken in connection with the undisputed fact of his previous ability to work, and the circumstances attend-

ing the accident, as to time, place, and manner of occurrence, would have been sufficient to warrant the inferences necessary to sustain the award. This is sufficient on appeal. *Conner v. Martin* (1910), 46 Ind. App. 141, 92 N. E. 3; *Bronnenberg v. Indiana Union Traction Co.* (1915), 59 Ind. App. 495, 109 N. E. 784; *Carter v. Richart* (1917), *ante* 255, 114 N. E. 110.

Appellant contends that the evidence shows that the said William Coleman was afflicted with syphilis at the time of the injury, and that his condition, subse-

2. quently to the accident in question, was identical to that of a normally developed syphilitic. The evidence as to the first alleged fact was conflicting, and the Industrial Board may have found to the contrary, which would be binding on this court on appeal. Again

the court may have found that he was so afflicted at the time of such accident, but that such disease was latent, and that such accident accelerated it to the stage of disability. Under such facts, the existence of such disease would not of itself prevent a recovery. *In re Bowers* (1917), *ante* 128, 116 N. E. 842, and authorities there cited.

Appellant finally contends that the doctrine to be applied under the facts of this case is one of degree:

(1) Degree of disability prior to the injury; (2) 4. degree of disability caused entirely by the injury; (3) degree of disability caused entirely by the disease; (4) degree of disability which might have resulted from the disease alone. We cannot concur in this contention. There is no provision for the application of such a doctrine in the Workmen's Compensation Act, *supra*, of this state, and the courts of other jurisdictions have refused to recognize it under similar acts. *Madden's Case* (1916), 222 Mass. 487. 111 N. E. 379, L. R. A. 1916D 1000; *Hills v. Oval Wood Dish Co.* (1916), 191 Mich. 411, 158 N. W. 214.

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Finding no error in the record, the award is affirmed. As the appeal in this case was taken subsequently to the time the act of 1917, Acts 1917 p. 154, amending the Workmen's Compensation Act of 1915, *supra*, became effective, the award is hereby increased five per cent. in accordance with the mandatory provisions of said amended act.

NOTE.—Reported in 117 N. E. 502. Workmen's Compensation Act: see (a) and (b) to note *ante* 365; right of compensation where accident merely aggravates an existing condition, L. R. A. 1916A 32, 228.

HOUK v. HARTER ET AL.

[No. 9,296. Filed May 17, 1917. Rehearing denied
October 23, 1917.]

1. *APPEAL—Presenting Questions for Review.—Objections to Evidence.*—The correctness of rulings on objections to the admission of evidence cannot be determined in the absence of the evidence from the record. p. 374.
2. *APPEAL—Presenting Questions for Review.—Misconduct of Counsel.—Presumptions.*—Alleged misconduct of counsel in making statements outside the evidence in the argument to the jury is not available on appeal in the absence of the evidence from the record, and in such case it will be presumed in support of the trial court's ruling that the argument was confined to the evidence, and that appellant's objection was properly overruled, especially where the special bill of exceptions fails to disclose the nature of such objection. p. 374.
3. *APPEAL—Questions Reviewable.—Objections to Instructions.—Record.*—No question is presented for review as to alleged error in the giving and refusal of instructions where the instructions and any exceptions thereto are not made a part of the record either by a bill of exceptions or by order of the court, and the record does not show that appellant has complied with either §559 Burns 1914, §534 R. S. 1881, providing for the submission of special instructions before argument, or §561 Burns 1914, Acts 1907 p. 652, relating to the practice in giving instructions and saving exceptions to the giving and refusal thereof. p. 375.

From Montgomery Circuit Court; *M. W. Bruner*, Special Judge.

Action by Wilbur G. Houk against Hugh M. Harter and another. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

Wilbur G. Houk, for appellant.

Albert D. Thomas, *Andrew N. Foley* and *Nina Lindley*, for appellees.

IBACH, P. J.—This is an attempted appeal from a judgment against appellant in a suit brought by him against appellees to recover attorney fees. The error assigned for reversal arises in the overruling of his motion for a new trial.

It is contended in the first cause of the motion that there was error in permitting appellee's attorney to ask plaintiff, over his objection, while being exam-

1. ined as a witness, certain questions concerning his religious belief. We are precluded from determining this question for the reason that the evidence is not before us. *Morrison v. State* (1881), 76 Ind. 335, 337-339; *Hitt v. Carr* (1916), 62 Ind. App. 80, 109 N. E. 456, 461.

Appellant further contends that there was error in permitting appellee's attorney to make certain statements in his argument to the jury. Since the

2. evidence is not before us, we are unable to say that such argument was outside the record. But in such instances, to support the court's ruling, we will presume that the argument was confined to the evidence, and that no error was committed in overruling appellant's objection, and this is particularly true where the special bill of exceptions, as in this case, fails to disclose the nature of the objection in the court below.

The next cause of the motion for a new trial involves the action of the trial court in giving and refusing to

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give certain instructions. The instructions and
3. any exception thereto, if any was taken in the court below, are not made a part of the record by a bill of exceptions or by order of court, and the record does not show that appellant complied with the provisions of either §559 Burns 1914, §534 R. S. 1881, or §561 Burns 1914, Acts 1907 p. 652; therefore the instructions and the rulings thereon are not properly identified and present no question.

We are forced to the conclusion that no error is presented by the appeal.

Judgment affirmed.

NOTE.—Reported in 116 N. E. 56.

MARTIN v. BOARD OF COMMISSIONERS OF THE
COUNTY OF PIKE ET AL.

[No. 9,435. Filed October 23, 1917.]

1. **APPEAL.**—*Presenting Questions for Review.—Ruling on Demurrer.—Motion for New Trial.*—Where the complaint was in a single paragraph, and plaintiff elected to stand thereon after an adverse ruling on demurrer, it was unnecessary for him to move for a new trial, and the ruling on the motion therefor presents no question for review on appeal. p. 378.
2. **APPEAL.**—*Review.—Ruling on Demurrer.—Scope of Review.*—A ruling of the trial court sustaining a demurrer to a complaint will, if correct, be sustained on appeal, regardless of the correctness of the grounds set forth in the memorandum accompanying the demurrer. p. 378.
3. **INJUNCTION.**—*Complaint.—Right to Relief.*—One demanding the aid of a court must have some interest in the matter or controversy which he seeks to have litigated and determined, and, when the appeal is to equity for injunctive relief, facts and circumstances must be alleged showing more than a mere technical and inconsequential wrong or irregularity in the proceedings sought to be enjoined. p. 378.
4. **INJUNCTION.**—*Right to Relief.—Remedy at Law.—Statute.*—Under §9511 Burns 1914, Acts 1911 p. 185, providing that under the direction of the board of commissioners the county

surveyor shall have charge of all county surveying and engineering work, including the preparation of plans and specifications for, and general supervision and construction of, all bridges, provided, that if the county surveyor is not a competent civil engineer, then the board shall appoint one to supervise the work ordered, but in such case the county surveyor shall have the right to a hearing as to his competency before the judge of the circuit or superior court of the county, the board's appointment of another than the county surveyor to prepare plans and specifications for a bridge and to supervise its construction was, in effect, a finding that the surveyor was incompetent, and his only remedy, in the absence of fraud or corruption, was a hearing as provided by the statute, and he could not enjoin the construction of the bridge on the ground that the proceedings were rendered void by the employment of another to act as engineer. pp. 379, 381.

5. **BRIDGES.**—*Construction.*—*Discretion of Board of Commissioners.*—Under §§3821, 7687 Burns 1914, §§2885, 5130 R. S. 1881, authorizing the building or repairing of bridges whenever in the opinion of the board of county commissioners such work is required for the convenience of the public, whether a bridge on a county highway shall be built is within the discretion of the board. p. 381.
6. **COUNTIES.**—*Appointment of County Engineer.*—*Powers of Board of County Commissioners.*—*Statute.*—Section 9511 Burns 1914, Acts 1911 p. 185, providing that if the county surveyor is not a competent civil engineer, the board of commissioners may appoint another to have charge of certain engineering work, but the surveyor may have a hearing as to his competency before the county judge, does not require a formal hearing or finding by the board as to the competency of the surveyor, and the finding of the board is conclusive unless set aside after the hearing provided by the statute. p. 382.

From Pike Circuit Court; *John L. Bretz*, Judge.

Action by Joshua Martin against the Board of Commissioners of Pike County and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Frank Ely and *J. W. Wilson*, for appellant.

William D. Curll, for appellees.

HOTTEL, C. J.—This is an appeal from a judgment in appellees' favor in an action predicated on a complaint in one paragraph, the material averments of

which, briefly stated, are as follows: Appellant was the surveyor of Pike county on April 1, 1915, and at that time and for months before was qualified to do and perform all surveying work required by law of him to be performed. At the April term, 1915, of the defendant board of commissioners, said board of commissioners ordered a certain bridge built in Pike county, and advertised for bids for the same to be opened at the May term. At the May term the board accepted the bid of the defendant bridge company, and at the same time employed the defendant Burch to prepare the necessary plans for the bridge and specifications therefor. The board refused to allow appellant to prepare said plans, although they knew that he was surveyor and qualified as provided by law, and willing to prepare them. The board ordered the defendant bridge company to erect said bridge according to the plans and specifications prepared by defendant Burch. Said Burch was at no time surveyor of Pike county or a deputy surveyor. The plans so prepared by him are void; he had no authority in law to prepare them. The advertising of the construction of said bridge according to said plans was void. It was the imperative duty of appellant to prepare said plans and specifications and his duty to superintend the erection of said bridge. The defendant board refused to allow appellant to perform said duty. Prayer that the erection of said bridge upon the plans prepared by said Burch be enjoined, and that defendant board be enjoined from employing any one other than appellant to perform the work incident to the erection of said bridge.

To this complaint appellees filed separate and several demurrers. These demurrers were sustained, and, appellant having refused to plead further, judgment was rendered against him on his complaint. A motion for new trial filed by appellant was overruled. The rulings

indicated are assigned as error and relied on for reversal. The complaint being in a single paragraph, and appellant having elected to stand thereon, after an adverse ruling on the demurrer thereto, the filing

1. of the motion for a new trial was unnecessary, and the ruling on such motion presents no question on appeal.

Appellees' said several demurrers are predicated on the first and fifth statutory grounds, provided by §344

Burns 1914, Acts 1911 p. 415, and are each ac-

2. companied by a memorandum stating wherein the complaint is insufficient. However, inasmuch as the ruling of the trial court on said demurrers, if correct, must be upheld regardless of whether the correct reason therefor be indicated in such memoranda, (*Bruns v. Cope* [1914], 182 Ind. 289, 105 N. E. 471; *Laufer v. Laufer* [1915], 61 Ind. App. 508, 112 N. E. 106), it is sufficient to indicate generally the propositions of law relied on by appellees which, we think, support the said ruling. These propositions are in substance as follows:

Anyone demanding the aid of a court must have some interest in the matter or controversy which he seeks to

have litigated and determined. §251 Burns

3. 1914, §251 R. S. 1881; *Shoemaker v. Board, etc.* (1871), 36 Ind. 175; *Erwin v. State, ex rel.* (1897), 150 Ind. 332, 345, 48 N. E. 249. And, when the appeal is to the equity side of the court, seeking injunctive relief, facts and circumstances must be alleged showing something more than a mere technical and inconsequential wrong or irregularity in the proceedings sought to be enjoined. 16 Am. and Eng. Ency. Law (2d ed.) 360; *Stauffer v. Cincinnati, etc., R. Co.* (1904), 33 Ind. App. 356, 70 N. E. 543; *American Plate Glass Co. v. Nicoson* (1904), 33 Ind. App. 643 73 N. E. 625.

The averments of the complaint do not show that appellant has any interest in the Vincennes Bridge Company, or that he is a taxpayer in Pike county.

4. The only averments tending to show any interest of appellant are those showing that during the period mentioned in the complaint he was the duly elected, qualified and acting county surveyor, at all times ready, willing and capable of performing all the duties required of him as such officer, including those of making plans and specifications for bridges, and the superintending of the building of such bridges. The only thing in which he is shown to have been interested, by said averments, was his employment by the board of commissioners to make the plans and specifications of said bridge, and to superintend the building thereof, and his only complaint is of the board's refusal to employ him to do said work.

In this action of the board he had an interest and, if he was not satisfied therewith, he should have availed himself of the remedy given by the statute, §9511 Burns 1914, *infra*. Instead, however, of seeking relief against the action of the board in which he was interested, and availing himself of the remedy which the statute, *supra*, gives him, he seeks to enjoin the carrying out of the contract entered into by said board, and its coappellee, the bridge company, on the theory that the refusal of the board to employ him, and its employment of another to do said work, rendered the entire proceeding for the building of said bridge void.

The employment of an engineer other than appellant, who was the county surveyor, and the refusal to employ appellant, were but steps in the proceeding authorizing the building of the bridge and the letting of the contract therefor; and, unless appellant's appointment was essential to the jurisdiction of the board of commissioners over the subject-matter, viz., the building

of the bridge, or essential to the validity of the order and judgment of such board in said proceeding, the board's action in such matter, in the absence of fraud or corruption, would furnish no ground for enjoining the building of such bridge under such order and judgment. *Waugh v. Board, etc.* (1916), 64 Ind. App. 123, 115 N. E. 356; *Bass v. City of Fort Wayne* (1890), 121 Ind. 389, 23 N. E. 259; *Rhodes, etc., Furniture Co. v. Mattox* (1893), 135 Ind. 372, 34 N. E. 326, 35 N. E. 11; *Board, etc. v. Reeves* (1897), 148 Ind. 467, 46 N. E. 995; *Davis v. Clements* (1897), 148 Ind. 605, 47 N. E. 1056, 62 Am. St. 539.

It is true the complaint contains some general statements by way of conclusion, that said plans and specifications of Burch, under which the contract was let, and the advertising and letting of the contract thereunder were invalid and void, but such general averments are controlled by the specific averments on which they rest, and such specific averments, as before indicated, show conclusively that the only acts relied on as invalidating said proceeding was the action of said board in refusing to employ appellant, and its employment of another engineer to make the plans and specifications for said bridge and to superintend the building thereof. In fact, appellant concedes that the disposition of this appeal turns upon §9511 Burns 1914, Acts 1911 p. 185, which provides that: "It shall be the duty of such surveyor, whenever directed so to do by the board, to procure a copy of the original field notes of the townships in his county, have the same recorded, and hand them, as well as all other papers, maps, books and charts belonging to his office, over to his successor. Under the direction of the board of county commissioners they shall have charge of all surveying and civil engineering work of the county in which they are severally located, including the preparation of plans and

specifications for, and general supervision and construction of all bridges, turnpikes, or other roads, ditches, drains or levees, and all other surveying and civil engineering work within and for said county: Provided, however, that if said county surveyor be not a competent civil engineer, then said board of commissioners, whenever such work is petitioned for or ordered, shall appoint some competent civil engineer, other than the county surveyor: and, Provided further, That such county surveyor shall have the right of a hearing as to his competency before the judge of the circuit or superior court of said county, when any such board refuses to appoint such surveyor as herein required and the order of such judge shall be final and conclusive."

Whether a bridge such as the one in question shall be built is within the discretion of the board of commissioners. §3821 Burns 1914, §2885 R. S.

5. 1881; §7687 Burns 1914, §5130 R. S. 1881; *State, ex rel. v. Board, etc.* (1889), 119 Ind. 444, 21 N. E. 1097; *Board, etc. v. State* (1895), 141 Ind. 187, 40 N. E. 686.

The board having determined to build the bridge, it then becomes its duty, under §9511, *supra*, should the county surveyor not be a competent civil engi-

4. neer, to appoint a competent civil engineer to prepare the plans and specifications for the bridge and to supervise its construction. If in the judgment of the board, the surveyor is a competent civil engineer, it is the right and duty of the surveyor to prepare such plans and specifications and to supervise such construction. If the board's judgment is otherwise, it must appoint a competent civil engineer.

It is obvious, then, that in order to perform its duty, the board must first determine whether the county surveyor is a competent civil engineer. In the instant case, the appointment of the defendant Burch was, in

effect, a finding by the board that plaintiff was not a competent civil engineer.

Said section does not require a formal hearing or finding by the board as to the competency of the surveyor, but merely requires that if he be not a

6. competent civil engineer, the board shall appoint one. It does, however, give the surveyor a right to a hearing on the question of his competency before the judge of the circuit or superior court, whose decision and order shall be final and conclusive. The question of the competency of the surveyor is thus left within the discretion of the board, subject to the order of the judge of the circuit or superior court after a hearing which the surveyor may demand, but which does not appear to have been demanded by the plaintiff.

The finding of the board in this case was conclusive, under §9511, *supra*, unless set aside in the manner provided by said section, and, having been made by the board in the exercise of its discretion, it cannot be attacked as was here done, on the ground that it was, in fact, false. *Waugh v. Board, etc., supra*; *Heagy v. Black* (1883), 90 Ind. 534; *Board, etc. v. Hall* (1880), 70 Ind. 469; *Ricketts v. Spraker* (1881), 77 Ind. 371.

The complaint did not state facts which would entitle plaintiff to injunctive relief, and the demurrers thereto were properly sustained. There being no error in the record, the judgment of the trial court is affirmed.

NOTE.—Reported in 117 N. E. 517. See under (3, 4) 22 Cyc 760, 774. Injunction to prevent violation of contract by employer, 90 Am. St. 651.

CLINE ET AL. v. INDIANAPOLIS MORTAR AND FUEL
COMPANY ET AL.

[No. 9,328. Filed October 24, 1917.]

1. **MECHANICS' LIENS.**—*Notice.*—*Requisites and Sufficiency.*—*Statute.*—Under §8297 Burns 1914, Acts 1909 p. 295, providing that any person wishing to acquire a mechanic's lien shall file a notice of his intention to hold a lien, setting forth the amount claimed and giving a substantial description of the land, a notice of intention to hold a mechanic's lien need not state by whom the claim is owing. (*Windfall Natural Gas, etc., Co. v. Roe* [1908], 42 Ind. App. 278, disapproved.) pp. 386, 387.
2. **MECHANICS' LIENS.**—*Statutes.*—*Construction.*—Mechanic's lien statutes must be strictly construed in determining the persons entitled to acquire and enforce such liens, but, being remedial in character, they should be liberally construed in favor of those entitled to their benefits. p. 387.
3. **MECHANICS' LIENS.**—*Notice.*—*Requisites and Sufficiency.*—A notice of intention to hold a mechanic's lien, in substantial conformity with the statute, is sufficient, and errors in respect to matters not required to be included in the notice will not invalidate or defeat the lien. p. 388.
4. **MECHANICS' LIENS.**—*Notice.*—*Requisites and Sufficiency.*—A notice of intention to hold a mechanic's lien, addressed to the owners in terms, "You are hereby notified that" plaintiff "intend to hold a mechanic's lien on the following property," describing it, "as well as upon the house recently erected thereon by the" owners and the contractor, setting forth the amount, "for work and labor done, and materials furnished by us in the erection and construction of said house, which work and labor done, and materials furnished, and all other improvements, was done and furnished by us at your special request and instance and within the last sixty days" was sufficient under the statute (§8297 Burns 1914, Acts 1909 p. 295), though the materials were actually furnished at the request of the contractor. p. 389.
5. **APPEAL.**—*Review.*—*Evidence.*—*Weight and Sufficiency.*—Where there is evidence to support every material allegation of the complaint, the court on appeal will not weigh conflicting evidence to determine its preponderance, and the decision of the trial court thereon is conclusive on appeal. p. 390.

From Marion Circuit Court (23,557); *Louis B. Ewbank*, Judge.

Cline v. Indianapolis Mortar, etc., Co.—65 Ind. App. 383.

Action by the Indianapolis Mortar and Fuel Company and others against Fred Cline and others. From the judgment rendered, the defendants appeal. *Affirmed.*

Frederick E. Matson, Ralph K. Kane and James A. Ross, for appellants.

Frank C. Groninger, Taylor E. Groninger and Ella M. Groninger, for appellees.

BATMAN, J.—Appellee Indianapolis Mortar and Fuel Company filed its complaint against appellee Ward B. Snyder and appellants to foreclose a mechanic's lien against certain real estate owned by appellants, and for a personal judgment against appellee Snyder. The complaint is in a single paragraph, and alleges in substance, among other things, that on September 27, 1912, appellants were and still are the owners of certain real estate in Marion county, Indiana, (describing it); that while the owners thereof, appellants entered into a contract with appellee Snyder for the erection and construction of certain improvements thereon, by the terms of which he was to furnish all the necessary labor and material therefor; that in pursuance of said contract and in order to perform the same, said appellee ordered of it certain building material, as shown by the bill of particulars filed therewith and made a part thereof, for the purpose of using the same in the erection and construction of said improvements; that it delivered said building material to said appellee on said real estate for such purpose, and the same was used by said appellee, in the construction of such improvements in pursuance of his said contract with appellants, and was reasonably worth the amount charged therefor, to wit, \$483.30; that on March 20, 1913, less than sixty days after said building material was furnished by it to appellants and appellee Snyder as aforesaid, it filed in the office of the recorder of Marion county, Indiana,

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its written notice of intention to hold a lien on said real estate for said amount, in which it set out a substantial description of said real estate, the amount claimed by it, and all other facts required by the statute governing such matters, a copy of which notice was filed therewith and made a part thereof; that the notice was duly recorded in said office on said date; that no part of its said bill has been paid, and that the same was past due and wholly unpaid. The demand is for judgment for \$650, and the foreclosure of its lien against said real estate. The copy of the notice filed with the complaint reads as follows:

“To Fred Cline and Bunie E. Cline and all others concerned:

You are hereby notified that Indianapolis Mortar and Fuel Company intend to hold a mechanic's lien on the following property in County of Marion, State of Indiana, to wit: (Here follows description of real estate), as well as upon the house recently erected thereon by you and W. B. Snyder (contractor) for the sum of five hundred and five and 55/100 Dollars (\$505.55) for work and labor done, and materials furnished by us in the erection and construction of said house, which work and labor done, and materials furnished, and all other improvements, was done and furnished by us at your special request and instance and within the last sixty days.

“Indianapolis Mortar & Fuel Co.

“By Chas. Pigman, Sec.”

Appellee Snyder suffered default, and appellants filed an answer in general denial. Trial was had by the court, resulting in a judgment against appellee Snyder for \$514.12 and a decree foreclosing the lien against said real estate for \$556.12. From this judgment appellants prosecute this appeal. The sole error assigned is based on the action of the court in overruling their motion for a new trial, in which it is alleged that the decision of the

court is not sustained by sufficient evidence and is contrary to law.

Appellants' first contention is that a notice of intention to hold a mechanic's lien, to be sufficient under the statute, shall state by whom the claim for which

1. the lien is sought is owing, and that a failure to state such fact correctly is fatal to a recovery.

They insist that the notice of intention filed with the complaint in this case states that the claim is due from them, while the complaint alleges, and the evidence shows, that such claim was due from appellee Snyder, and that such fact constitutes a variance, fatal to its right to foreclose its alleged lien against their real estate. An examination of the statute in question leads us to the conclusion that such contention cannot be sustained. It is generally held that a notice of intention to hold a mechanic's lien need not set out anything beyond that which the statute requires. 20 Am. and Eng. Ency. Law (2d ed.) 409; 27 Cyc 110, 153; *Mouat Lumber, etc., Co. v. Freeman* (1895), 7 Colo. App. 152, 42 Pac. 1040; *Red River Lumber Co. v. Congregation, etc.* (1897), 7 N. D. 46, 73 N. W. 203; *Welch v. McGrath* (1882), 59 Iowa 519, 10 N. W. 810, 13 N. W. 638. The requirements of such a notice in this state is governed by §8297 Burns 1914, Acts 1909 p. 295. It provides that any person wishing to acquire such lien shall file a "notice of his intention to hold a lien upon such property for the amount of his claim, specifically setting forth the amount claimed, and giving a substantial description of such lot or land," etc. The statute thus specifically provides what must be set out in such notice, and fails to make any provision for stating by whom the claim is owing. The omission of such requirement from the statute renders any such statement in the notice unnecessary. *Adams v. Buhler* (1892), 131 Ind. 66, 30 N. E. 883; *Lays v. Hurley* (1913), 215

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Mass. 582, 103 N. E. 52; *Peck v. Hensley* (1863), 21 Ind. 344; *Farmers Loan, etc., Co. v. Canada, etc., R. Co.* (1891), 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740; *Clark v. Huey* (1895), 12 Ind. App. 224, 40 N. E. 152; *Springer Land Assn. v. Ford* (1897), 168 U. S. 513, 18 Sup. Ct. 170, 42 L. Ed. 562; *Corbett v. Chambers* (1895), 109 Cal. 178, 41 Pac. 873. The conclusion

we have reached finds support in the well-settled

2. rule that mechanic's lien statutes must be strictly construed, in determining the persons entitled to acquire and enforce such liens, but, being remedial in character, they should be liberally construed, in order to carry their object into effect in giving a lien to those entitled to their benefits. *Rader v. A. J. Barrett Co.* (1914), 59 Ind. App. 27, 108 N. E. 883; *Deal v. Plass* (1915), 59 Ind. App. 185, 109 N. E. 51; *McNamee v. Rauck* (1891), 128 Ind. 59, 27 N. E. 423; *Indianapolis, etc., Traction Co. v. Brennan* (1909), 174 Ind. 1, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85. The fact that appellee furnished ma-

terial for the construction of appellants' building

1. brings it within the class entitled to the benefits of the statute in question, and entitles it to an application of the rule of liberal construction. To sustain appellants' contention, we would not only be required to deny an application of such rule, but go even further and engraft a requirement, neither directly nor inferentially imposed by the statute.

Appellants cite a number of cases in support of their contention as to the required contents of such a notice, chief among which is the case of *Windfall Natural Gas, etc., Co. v. Roe* (1908), 42 Ind. App. 278, 85 N. E. 722. The opinion in that case states that the statute requires that a notice to be sufficient to establish a mechanic's lien shall state the amount, to whom and by whom, and for what due, and shall describe the premises so that

the owner may know the property intended to be charged, citing §8297 Burns 1908, *supra*, and four Indiana cases. An examination of this section leads us to conclude, that the words "by whom" were inadvertently inserted in such statement, and given effect in such opinion, as the section is wholly silent in that regard. The cases cited in the opinion, as well as in appellants' brief in support of such requirement, go no further than to include the words quoted in a recital of what would be a sufficient notice, but none hold that a notice would not be sufficient if it failed to state by whom the claim was owing. In view of the plain reading of the statute and the general rule governing the requirements of such notices, we cannot follow the case of *Windfall Nat. Gas, etc., Co. v. Roe, supra*, in that regard. Under the construction we have given the statute, the variance suggested by appellants would be on an immaterial matter.

Moreover, it is well settled that a notice of intention to hold a mechanic's lien, in substantial conformity with the statute, is sufficient, and that errors in re-

3. spect to matters not required to be included in the notice will not invalidate it or defeat the lien. This is especially true as affecting the rights of the original parties to the contract. *Midland R. Co. v. Wilcox* (1890), 122 Ind. 84, 23 N. E. 506; *Albrecht v. C. C. Foster Lumber Co.* (1890), 126 Ind. 318, 26 N. E. 157; 27 Cyc 111; 20 Am. and Eng. Ency. Law (2d ed.) 408, 409; Phillips, *Mechanic's Liens* (3d ed.) §§16, 342a. It has also been held that a lien will not be defeated by reason of an unintentional misstatement or a trivial error, omission, or surplusage in the notice, where the defect is not misleading; and that only such misstatements or inaccuracies in the notice as are calculated to mislead others should defeat the lien, if there has been a substantial compliance with the require-

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ments. 27 Cyc 200; 20 Am. and Eng. Ency. Law (2d ed.) 426; Phillips, Mechanic's Liens §§16, 342b, 345; *Clark v. Huey, supra*. An examination of the notice in question leads us to conclude that ap-

4. pellants could not have been misled, as to who was primarily liable for the claim for which the lien was sought. They were the owners of the property, and the original parties who contracted with appellee Snyder for the construction of the improvement. The rights of third persons, relying on the record of the notice are, therefore, not involved. The notice states in substance that such appellee was the contractor for such construction; that the material was furnished by claimant for such construction; and that it was so furnished within the last sixty days. True the notice was addressed to appellants, and recited that such material was furnished at their special instance and request, but from a consideration of the notice as a whole it cannot be said to have been misleading. Inasmuch as it is not claimed that any one was deceived or misled by such notice, we are of the opinion that it clearly comes within the rules^o stated. Our conclusion is fully supported by the case of *Clark v. Huey, supra*. In that case it was contended that the complaint was insufficient for the reason that it proceeded upon the theory that the materials mentioned in the bill of particulars were furnished to the contractor for one Clark as the owner, while the notice was directed to said Clark and his wife, for material furnished to them at their request. In passing upon this question the court said, on page 226: "We do not think there is a material variance between the contents of the copy filed as an exhibit and the averments of the complaint, respecting the person or persons to whom the materials were furnished. If the materials were furnished to the contractor for Clark and wife, to be used in the building,

and were so used, all of which is averred in the complaint, a notice directed to Clark and wife, in which it is stated that the materials were furnished to them at their instance and request, in the improvement or construction of the house, will be sufficient to secure the lien. The mere wording of the notice is of little importance. Its chief office is to apprise the owner and others interested that the furnisher of the materials claims to have a lien on the property."

Appellants also contend that the decision of the court is not sustained by sufficient evidence. We have examined the record and find there was some evidence

5. to support every material allegation of the complaint. Under such circumstances this court will not weigh conflicting evidence and determine its preponderance, but under the well-established rule will accept the decision of the trial court in that regard as conclusive on appeal. *Beavers v. Bess* (1914), 58 Ind. App. 287, 108 N. E. 266; *Vandalia R. Co. v. House* (1914), 59 Ind. App. 10, 108 N. E. 872; *Nicholson v. Smith* (1915), 60 Ind. App. 385, 110 N. E. 1007; *Dorrell v. Herr* (1915), 184 Ind. 445, 111 N. E. 614.

Judgment affirmed.

NOTE.—Reported in 117 N. E. 509.

HOLSAPPLE ET AL. v. SHRONTZ.

[No. 9,427. Filed October 24, 1917.]

1. TRUSTS.—*Creation*.—The word "trust" is frequently employed to indicate duties, relations and responsibilities which are not strictly and technically trusts. p. 396.
2. TRUSTS.—*Express Trust*.—*Creation*.—The term "express trust" signifies a trust created by the direct and positive acts of the parties as evidenced by some deed, will, or other instrument, wherein the language employed either expressly or by plain implication evinces an intention to create a trust. p. 396.

3. TRUSTS.—*Implied Trusts.—Creation.*—Implied trusts are those which, without being expressed, are deducible from the relation of the parties and the nature of the transaction as matters of intent, or which by operation of law are deduced from transactions of the parties as a matter of equity independent of the particular intention of the parties. p. 397.
4. TRUSTS.—*Creation.—Intent.*—The creation of a trust does not depend upon the use of any particular language or form of expression, but upon the meaning of the language employed when fairly construed in the light of the circumstances, relation, and situation of the parties, and, if the intent to create a trust is clear and the essential elements may be fairly deduced from the language used, the trust will not fail for the lack of more adequate expression. p. 397.
5. TRUSTS.—*Express Trusts.—Creation.—Requisites.*—When the settlor, the trustee, the *cestui que trust*, the property transferred to the trustee, and the object to be attained, all appear with reasonable certainty from the writing, the requirements of the law are satisfied and an express trust is thereby established which will be recognized and enforced. p. 397.
6. TRUSTS.—*Express Trusts.—Creation.—Deed.*—A deed for land from a mother to her son whereby he agreed to use the rentals of the property to support the family and to educate the girls, and, if finally sold, to divide the price received therefor equally among the then living heirs or members of the family if of age, otherwise to hold such shares until the minors attained their majority, creates an express trust in the land conveyed, for the purpose designated. p. 398.
7. TRUSTS.—*Express Trusts.—Trustee.—Powers.—Violation of Trust.*—Where a duly recorded deed of land from a mother to son stipulated that he was to use the rentals of the property to support the family and to educate the girls and, if sold, divide the money received equally among the members of the family, it was in contravention of the trust created by such conveyance for the son to convey the property as an individual and not as trustee, and his deed was void and the grantee did not thereby acquire any title as against the *cestui que trusts*, in view of §4016 Burns 1914, §2973 R. S. 1881, providing that every sale, conveyance, or other act of a trustee, in contravention of a trust, shall be void, and §4014 Burns 1914, §2971 R. S. 1881, providing that the record of a trust shall be deemed actual notice thereof to every person claiming under a conveyance made after such recording. p. 399, 400.
8. TRUSTEES.—*Powers of Trustee.—Barter or Exchange of Trust Property.*—Power to sell trust property does not authorize a trustee to barter or exchange it for other property, and such

power can only be exercised in conformity with the requirements of the instrument by which the trust is created and in furtherance of the ends to be attained by the creation of the trust. p. 399.

9. TRUSTS.—*Express Trusts.—Validity.—Interest of Trustee.*—The fact that the trustee named in a deed creating a trust is also given a personal interest in the real estate will not defeat the trust. p. 400.

From Martin Circuit Court; *James W. Ogdon*, Judge.

Action by Vessey Holsapple and others against Leroy Shrontz. From a judgment for defendant, the plaintiffs appeal. *Reversed.*

Frank E. Gilkison, for appellants.

Fabius Gwin, for appellee.

FELT, J.—This suit was brought by appellants against appellee by a complaint in three paragraphs. The first paragraph was for partition of 240 acres of real estate in Martin county, Indiana, in which it was alleged that the plaintiffs Vessey Holsapple and Joseph Elliott, and the defendant, Shrontz, each owned the undivided one-fourth, and plaintiffs Annie Gerkin and Virgil Gerkin each the undivided one-eighth part of the real estate described in the complaint; that Stoie P. Holsapple was the husband of Vessey Holsapple.

The second paragraph alleges in substance that Vessey Holsapple, Joseph Elliott and Fay Elliott were children of Charity Elliott; that Annie and Virgil Gerkin were her grandchildren, and the aforesaid persons were the only heirs at law of said Charity Elliott, when she departed this life in 1911; that at and prior to the death of Charity Elliott, Fay Elliott was the son and only adult child of Charity Elliott; that the other children and grandchildren aforesaid were minors, and all lived together as members of the family of Charity Elliott, their mother and grandmother; that said Charity had received from her husband a convey-

ance of the aforesaid real estate prior to his death, and the same was the only real estate owned by her; that shortly prior to June, 1911, Charity Elliott was ill with tuberculosis and moved with her family from Martin county, Indiana, to Weld county, Colorado, for her health; that on June 17, 1911, she was very ill and believed she was soon going to die; that to save costs and expenses of administration, and to protect her minor children, she executed a conveyance to her son Fay Elliott of her personal property and the real estate aforesaid; that the property was conveyed by deed duly executed and was in trust for the minor children and grandchildren of said Charity Elliott, which trust was created by the language of said deed as follows:

“Said party of the second part agreeing to use the rentals of said property to support the family and to educate the girls and if finally sold, to divide the price received therefor equally among the then living heirs or members of the family if of age, otherwise hold said shares till minors become of age.”

That said Charity Elliott died soon after she executed said conveyance; that the deed to Fay Elliott was shortly thereafter duly recorded in the office of the recorder of Martin county, Indiana; that in January, 1913, Fay Elliott, by deed of general warranty, attempted to convey all of said real estate to defendant Leroy Shrontz; that none of the plaintiffs joined in the execution of the deed to said grantee. The paragraph contains detailed averments about the sale of timber, the collection of rents, the wrongful possession and use of all of the farm by Shrontz, the claim of Shrontz to own all the land by virtue of the conveyance to him by Fay Elliott, and alleges the interest claimed by the plaintiffs; that the real estate is not susceptible of partition without damage, etc. The prayer is for an ac-

counting, for a decree of partition, and the appointment of a commissioner to sell the land and distribute the proceeds to the several owners in accordance with their respective interests.

The third paragraph is substantially the same as the second. It is also averred therein that the property of Charity Elliott was conveyed by her to Fay Elliott without any consideration and in trust for her minor heirs; that she died about four hours after she executed the deed. The prayer asks that a trust be declared and that said Shrontz be charged as holding the property in trust; that a trustee be appointed for an accounting and for all proper relief.

The deed to Fay Elliott is set out in full as an exhibit with the second and third paragraphs. Issues were joined by general denials. The court found for the defendant and adjudged that plaintiffs take nothing by their action. Appellants moved for a new trial. The motion was overruled and this appeal prayed and granted. The error assigned and relied on for reversal is the overruling of appellants' motion for a new trial. A new trial was asked on the ground that the decision of the court is not sustained by sufficient evidence; that it is contrary to law.

The deed executed to Fay Elliott by his mother purports to have been executed for a consideration of one dollar and "other valuable considerations." It is in the long form of bargain and sale with the usual covenants. The parties agree that the legal title is conveyed to Fay Elliott, but differ as to the effect of the clause above set out. Appellee contends that it only indicates the motive of the grantor in making the conveyance, and that it in no sense created a trust or affected the right of the grantee, Fay Elliott, to sell and convey the property as his own. Appellants contend that the language of the deed when considered in the light of the situation

and relation of the parties as shown by the undisputed facts of the case, clearly indicates the creation of a trust, by which Fay Elliott became trustee for the other heirs and members of his mother's family; that his conveyance of the legal title cannot defeat their right to the three-fourths part of such land; that he had no right to sell and convey the legal title to all of said real estate except in execution of the trust, in which event the deed contains provisions by which the other heirs of his mother shall have their interest in the land preserved to them; that appellee is charged by the record with notice of the contents of the deed to his grantor and the existence of the trust thereby created; that in no event could Fay Elliott dispose of the land in exchange for other real estate and personal property.

Fay Elliott testified in substance that he and the other heirs of his mother were living as members of her family when the deed was made; that she died about one hour after its execution; that it was executed in Colorado and he took it with him to Indiana when his mother was taken back for burial; that he caused it to be recorded four or five days after its execution; that he sold and conveyed the land to appellee as his own individual property and received therefor \$1,100 in cash, two dwelling houses and a postoffice and store building with its contents, at Mier, Indiana; that he received the rents while he had the farm and used them in caring for the family according to his agreement; that his mother had no other property to his knowledge except that transferred to him by the deed aforesaid.

As presented to this court, there is no dispute about the facts in any way bearing on the question of the creation of a trust or the showing of the grantor's motive, as the case may be, the determination of which the parties concede will control our decision. The question turns upon the meaning of the clause in the

deed above set out relating to the agreement of the grantee as to the rentals, the support of the family, the education of the girls, the sale of the property and the disposition of the proceeds.

The word "trust" is frequently employed to indicate duties, relations, and responsibilities which are not strictly and technically trusts. In its technical

1. application the word has been variously defined.

In 1 Perry on Trusts (6th ed.) §2, the term is defined to signify an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence. The same author in §24 says trusts are divided in reference to their creation into express, implied, resulting, and constructive trusts; that an express trust is generally created by instruments that point out directly and expressly the property, persons and purposes of the trust. In 2 Story's Equity Jurisprudence (13th ed.), §964, the learned author states in substance that in the broad sense in which the term "trust" is employed in English jurisprudence, it is an equitable right, title or interest in property real or personal, distinct from the legal ownership thereof. That the legal owner holds the direct and absolute dominion over the property, but the income, profits or benefits thereof, though in his hands, belong wholly or in part to others; that the legal estate is thus made subservient to certain uses, benefits or charges in favor of others; and these uses, benefits or charges constitute the trust which courts of equity will compel the legal owner as trustee to perform in favor of the *cestui que trust*, or beneficiary.

The term "express trust" signifies a trust created by the direct and positive acts of the parties

2. as evidenced by some deed, will, or other instrument, wherein the language employed either ex-

pressly or by plain implication evinces an intention to create a trust.

Implied trusts are those which, without being expressed, are deducible from the relation of the parties and the nature of the transaction as matters of

3. intent, or which by operation of law are deduced from the transactions of the parties as a matter of equity independent of the particular intention of the parties. 1 Perry, Trusts (6th ed.) §§73-82; 39 Cyc 17, 24, and cases cited; 28 Am. and Eng. Ency. Law 848 *et seq.*

The creation of a trust does not depend upon the use of any particular language or form of expression, but upon the meaning of the language employed

4. when fairly construed in the light of the circumstances, relation, and situation of the parties. If the intent to create a trust is clear and the essential elements may be fairly deduced from the language employed, the trust will not fail for the lack of more adequate expression. *Grant Trust, etc., Co. v. Tucker* (1911), 49 Ind. App. 345, 352, 354, 96 N. E. 487; *Gaylord v. City, etc.* (1888), 115 Ind. 423, 428, 430, 17 N. E. 899; *Anderson v. Crist* (1888), 113 Ind. 65, 67, 15 N. E. 9; 1 Perry, Trusts (6th ed.) §§82, 83.

When the settlor, or person creating the trust, the trustee, or person who takes and holds the legal title to the property for the benefit of others, the *cestui*

5. *que trust*, or person for whose benefit the trust is created, the property transferred to the trustee, and the object to be attained, all appear with reasonable certainty from the writing, the requirements of the law are satisfied and an express trust is thereby established, which the courts will recognize and enforce. *Gaylord v. City, etc., supra*; §4012 Burns 1914, §2969 R. S. 1881; 1 Perry, Trusts (6th ed.) §§82, 83.

The language of the deed in question cannot fairly

be construed as precatory, or as indicating only the motive which prompted its execution. It shows

6. an obligation placed upon the grantee to do certain specified things. The reference to a sale, though indefinite as to the conditions or time of such sale, nevertheless clearly shows that if a sale should be made, the grantee, or trustee as he became when he accepted the conveyance, was required to divide the proceeds therefrom "among the then living heirs or members of the family, if of age, otherwise to hold said shares till minors become of age," when by the clearest possible implication he was required to pay the same over to such person or persons. The grantee was the son of the grantor and a member of her family. The provision therefore clearly indicates that upon sale of the property he was entitled to his equal share of the proceeds, and no more, along with the other heirs or members of the family of the grantor. The sale of the property and the distribution of the funds as indicated by the language employed would have secured to each heir his or her interest in the land and ended the trust. The language of the deed when fairly construed is not open to any other inference or reasonable conclusion than that above announced. When viewed in the light of the circumstances, relations and situation of the parties, as we have the right, and are in duty bound, to do, the conclusion is inevitable that a valid express trust was created in the land conveyed, for the purposes designated in the deed in favor of the children and grandchildren of the grantor, for the faithful execution of which Fay Elliott was bound as trustee. This conclusion is fully supported by the principles of law applicable to the case and by the decided cases dealing with the same or closely analogous questions. 1 Perry, Trusts (6th ed.) §§82, 83, 117; *Anderson v. Crist*, *supra*; *Elliott v. Elliott* (1889), 117 Ind. 380, 20 N.

E. 264, 10 Am. St. 54; *Gaylord v. City, etc., supra*; *Allen v. McGee* (1901), 158 Ind. 465, 62 N. E. 1002; *VanGorder v. Smith* (1885), 99 Ind. 404; *South v. South* (1883), 91 Ind. 221, 46 Am. Rep. 591; *John v. Bradbury* (1884), 97 Ind. 263.

Though Fay Elliott held the legal title to the real estate conveyed to him by his mother, yet the language of the deed, the relation of the parties, and the

7. circumstances under which it was executed show, by plain implication at least, that he held such title subject to the equitable interest in the land of the *cestui que trusts*, named in the deed. The statements and conduct of Fay Elliott, and especially his conveyance to appellee, were in contravention of the trust. His claim of personal ownership of the real estate and the right to convey the same as his individual property free from the interests of the *cestui que trusts* was a denial of the trust and a violation of his duty as trustee. The conveyance of the trust property as an individual and not as a trustee, and the absence of any reference to the trust in the deed by which Fay Elliott conveyed the land to appellee, all tend to show an attempt to repudiate the trust.

Power to sell trust property does not authorize a trustee to barter or exchange it for other property. Such power can only be exercised in conformity with.

8. the requirements of the instrument by which the trust is created and in furtherance of the ends to be attained by the creation of the trust. 22 Am. and Eng. Ency. Law 1150; *Woodward v. Jewell* (1890), 140 U. S. 247, 253, 11 Sup. Ct. 784, 35 L. Ed. 478; *Ringgold v. Ringgold* (1826), Har. & G. (Md.) 11, 18 Am. Dec. 250, 255; *Mersman v. Mersman* (1896), 136 Mo. 244, 37 S. W. 909, 912; *Haldeman v. Openheimer* (1910), 103 Tex. 275, 126 S. W. 566, 568; 39 Cyc 348, 373, 374, 375; *City, etc. v. State Bank, etc.* (1865),

16 Ohio St. 236, 88 Am. Dec. 445, 450; *Huntt v. Townshend* (1869), 31 Md. 336, 100 Am. Dec. 63, 64; *Marshall v. Stephens* (1847), 8 Humph. (Tenn.) 159, 47 Am. Dec. 601.

Section 4016 Burns 1914, §2973 R. S. 1881, provides that: "Every sale, conveyance, or other act of a trustee, in contravention of a trust, shall be void."

7. Applying the statute to the facts of this case, it is clear that the conveyance to appellee was in contravention of the trust shown by the deed to Fay Elliott; that as to appellants the deed was void, and appellee did not thereby acquire any title as against the *cestui que trusts*.

The deed to Fay Elliott was duly recorded and appellee was bound to take notice of its contents. He was thereby notified of the existence and terms of the trust. §4014 Burns 1914, §2971 R. S. 1881. Furthermore, the facts above indicated, the terms of the trade, the real estate taken by Fay Elliott in exchange for the trust property, and the general character of the transaction was such that appellee was bound to know that the trust shown by the deed aforesaid was thereby violated. *Nugent v. Laduke* (1882), 87 Ind. 482, 485; *Thomasson v. Brown* (1873), 43 Ind. 203; *Orb v. Coapstick* (1894), 136 Ind. 313, 36 N. E. 278; *Barrett v. Sear* (1891), 128 Ind. 261, 27 N. E. 607.

The fact that Fay Elliott was made trustee by the terms of the deed and was also given a personal interest in the real estate will not defeat the trust.

9. *Allen v. McGee*, *supra*, 470; *Green v. McCord* (1902), 30 Ind. App. 470, 472, 66 N. E. 494.

The judgment is reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

Hottel, C. J., Ibach, P. J., Caldwell, Dausman and Batman, JJ., concur.

NOTE.—Reported in 117 N. E. 547. Effect of trustee's having a personal interest in the subject-matter of the trust, Ann. Cas. 1918A 481.

PEACOCK COAL AND MINING COMPANY v. CRAWFORD.

[No. 9,256. Filed October 25, 1917.]

1. **APPEAL.**—*Assignment of Error.*—*Grounds.*—An assignment of error that the complaint does not state facts sufficient to constitute a cause of action presents no question for review on appeal. p. 403.
2. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Action.*—*Complaint.*—*Sufficiency.*—In an action by a coal mine employe for personal injuries, a complaint alleging that defendant mine owner negligently failed to keep the mine room where plaintiff was ordered to work reasonably safe and failed to remove from the roof certain loose slate and rock, which fell upon and injured plaintiff while he was in the performance of his duties, and that the dangerous condition was known to defendant, but not to plaintiff, sufficiently charges a violation of the employer's common-law duty to keep the working place reasonably safe. p. 403.
3. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Instructions.*—*Applicability to Issues.*—*Duty to Inspect Mines.*—In an action by a coal mine employe for personal injuries, an instruction that it was defendant's duty, by its mine boss, to visit and examine plaintiff's working place each alternate day and in addition thereto to exercise ordinary care "all to the end that loose coal, slate, or rock overhead in the room where plaintiff was required to work should either be taken down or carefully secured," was erroneous, where neither the complaint nor the evidence raised the issue of the mine owner's statutory duty to inspect, and because it in effect informed the jury as to what would constitute the exercise of ordinary care. pp. 404, 405.
4. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Inspection of Mines.*—*Duty of Owner.*—The mine owner's statutory duty to inspect the mine refers to travel and air ways, and not to the miner's working place. p. 405.
5. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Employer's Liability Act.*—*Scope.*—*Coal Mines.*—An action may be maintained under the Employer's Liability Act (Acts 1911 p. 145, §8020a et seq. Burns 1914), for personal injuries sustained in coal mines. p. 405.
6. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Instructions.*—

Coal Mines.—Duty to Remove Loose Coal.—In an action by a mine employe for injuries caused by a fall of coal and rock from the roof of a mine, an instruction that it was the mine owner's duty to remove from the roof of the room where plaintiff was at work all loose slate, coal, or rock, wherever it was impracticable to prop it, was erroneous, since such duty is required by statute only in travel and air ways. p. 405.

7. *MASTER AND SERVANT.—Injuries to Servant.—Instructions.—Statutory Duty to Inspect Mines.*—In an action by a coal mine employe for injuries caused by a fall of loose coal from the roof of a mine room, an instruction that it was negligence imputable to defendant mine owner if its mine boss did not make the inspection required by statute, but omitting to state the duties prescribed by statute, is erroneous because submitting a question of law to the jury. p. 406.

8. *DAMAGES.—Personal Injuries.—Measure of Damages.—Instructions.*—In a servant's action for the loss of an arm and for other personal injuries, an instruction on the measure of damages limiting recovery to compensatory damages as shown by the evidence, and directing the jury in estimating plaintiff's damages, to consider only his crippled and maimed condition, and the nature, extent and duration thereof, the physical and mental pain he suffered because of the injuries, the length of time he was confined or unable to work, the diminution of his earning capacity, and the probable duration of his life, is not erroneous as permitting the consideration of improper elements of damages. p. 407.

From Gibson Circuit Court; *Simon L. Vandever*, Judge.

Action by *Finis E. Crawford* against the Peacock Coal and Mining Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Lucius C. Embree and *Morton C. Embree*, for appellant.

John H. Brill, *Frank H. Hatfield* and *John W. Brady*, for appellee.

IBACH, P. J.—Appellee recovered a judgment against appellant for \$2,000, damages for personal injuries received by him while at work in appellant's coal mine. The complaint was in two paragraphs upon which issues were joined by answer in general denial. The jury re-

turned a verdict in favor of appellee on the first paragraph, and in favor of appellant on the second paragraph of complaint. From the judgment rendered thereon appellant appeals and assigns as error: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that the court erred in overruling the motion for a new trial.

No question is presented by the first error assigned. The questions presented under the second assigned error challenge the verdict of the jury, as not

1. being sustained by sufficient evidence and as being contrary to law; and the giving or refusing to give certain instructions.

A consideration of these questions requires a determination first of the theory upon which the complaint is drawn. The negligence charged in the first

2. paragraph of complaint is in substance as follows: Appellant is a corporation, and on October 11, 1912, was engaged in mining coal in Pike county, Indiana. Appellant negligently failed and omitted to keep the working place in its said mine where appellee was assigned to work, and the roof thereof in a reasonably safe condition, and carelessly and negligently permitted the roof of said mine in room No. 1 to become weak, unsafe and dangerous on, and continuously for three days prior to, October 11, 1912, and to the time of appellee's injuries. With knowledge of the said weak, unsafe and dangerous condition of said roof appellant negligently failed and omitted to take down and remove therefrom certain loose slate and rock, which during all of said time was in said roof at said place; and negligently failed and omitted to otherwise make said roof reasonably safe and secure. With knowledge of the weak, unsafe and dangerous condition of the roof of said room No. 1, appellant on the morning of October 11, 1912, negligently and care-

lessly directed appellee to enter said room for the purpose of mining coal therein. Appellee did not at any time prior to his injury have any knowledge or notice of the weak, unsafe or dangerous condition of the roof but in obedience to the orders of appellant and believing said room and the roof thereof to be safe, appellee entered said room and began the performance of his duties in mining coal under his said employment, and while so engaged and within a few minutes after entering said room the roof suddenly gave way without warning and large quantities of said loose slate and rock fell therefrom upon appellee, crushing, etc. It is further alleged that "defendant during all the time aforesaid employed in its said mine more than five persons, to wit, twenty-five persons."

The controlling averments above set out clearly show that the first paragraph is based on a violation of the common-law duty to keep appellee's working place reasonably safe and is good upon that theory. The second paragraph is apparently based upon the breach of the common-law duty to furnish a reasonably safe place to work and the breach of the statutory duty to furnish props and timbers.

Under its motion for a new trial appellant claims that instructions Nos. 6, 8 and 9 given by the court of its own motion are erroneous.

Number 6 reads: "It was the defendant's duty, by its mine boss, to visit and examine the plaintiff's working place each alternate day, and in addition

3. thereto, to exercise ordinary care all to the end that loose coal, slate, or rock overhead in the room where the plaintiff was required to work should either be taken down or carefully secured. If the defendant company, through its mine boss, failed in the performance of this duty such failure constituted negligence."

Neither the first nor second paragraph of complaint charged a violation of the statutory requirement to visit and examine the plaintiff's working place each alternate day, and there was no evidence tending to show such fact. Further, the instruction in effect told the jury that ordinary care required that all loose coal, slate, or rock overhead in the room where appellee was required to work should either be taken down or carefully secured. The statutory duty in this respect

4. has application to travel and air ways, and not to the miner's working place. Under the theory of the first paragraph of complaint as to what

3. would constitute the exercise of ordinary care was a question of fact for the jury. It follows

that the instruction was erroneous upon either theory, tended to confuse the jury both as to the issues and the evidence and should not have been given. *Domestic Block Coal Co. v. DeArme* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99.

Appellant claims that instruction No. 8 is erroneous in that it is applicable to cases arising under the Employers' Liability Act of 1911 (Acts 1911 p. 145,

5. §8020a *et seq.* Burns 1914) only, and that that act has no application to injuries arising in coal

mines. Since the trial of this case the Supreme Court and this court have recognized that an action may be maintained under the act of 1911 for injuries arising in coal mines. *Vivian Collieries Co. v. Cahall* (1915), 184 Ind. 473, 110 N. E. 672; *Vandalia Coal Co. v. Shephard* (1918) — Ind. App. —, 113 N. E. 767.

Instruction No. 9 is claimed to be erroneous in that it confuses the duty of appellant toward its employes in their working places with that of travel and

6. air ways, and tells the jury that it is appellant's duty to remove all loose slate, coal, or rock,

wherever it is impracticable to prop it. Said instruction reads: "It is no defense to show that it was impossible or impracticable to prop the roof where the plaintiff was at work in order to secure overhanging loose coal, slate, or rock, for if that were the case, then it was the duty of the defendant, if such condition existed and defendant knew it, or in the exercise of ordinary care should have known thereof, to remove such loose overhanging coal, slate or rock, if you find it was at the place where plaintiff worked as charged in his complaint." The duty to remove loose overhanging coal, slate or rock where it is impossible or impracticable to prop the roof is one required by statute in travel and air ways, but such provision of the statute cannot be extended by construction to include the miner's working place. The giving of such instruction was error. *Domestic Block Coal Co. v. DeArmey*, *supra*.

Instruction No. 7, given at the request of appellee, is objected to. It reads in part as follows: "If you

find from the evidence that the mine boss of the
7. defendant at the time the plaintiff was injured
knew or by the exercise of reasonable care and
in the discharge of his duties would have known that in
the plaintiff's working place there was loose overhang-
ing slate, coal or rock that was liable to fall, *and that*
he did not perform the duty required of him by the
statute in this respect, then I instruct you that the fail-
ure to comply with this duty, is of itself negligence,
and that this negligence of the mine boss is imputed
to the defendant company and the defendant company
is chargeable with the results thereof."

Appellant contends that this instruction leaves a question of law for the determination of the jury, namely, "What duty was required of the mine boss in respect to loose overhanging slate, coal or rock?" By this instruction the court left it to the jury to deter-

mine whether the negligence which caused appellee's injuries was due to a violation of a statutory duty and yet failed in any wise to inform the jury as to what those duties were as prescribed by statute. It was error to submit such question of law to the jury. Appellee has not pointed out and we are unable to find any other instruction which was given obviating such error. *McDaniel v. Lebanon Lumber Co.* (1914), 71 Ore. 15, 140 Pac. 990, 992; *Oberlin v. Oregon, etc., Ins. Co.* (1914), 71 Ore. 177, 142 Pac. 554, 558; *Prudential Ins. Co. v. Union Trust Co.* (1914), 56 Ind. App. 418, 105 N. E. 505, 511. Said instruction is also open to the same objection discussed with reference to instruction No. 6, *supra*.

Instruction No. 11, given at request of appellee, is objected to. This instruction correctly stated the law and was applicable to both the issues and the evidence.

Instruction No. 15, given at the request of appellee, instructs the jury on the measure of damages. Appellant's objection to this instruction is that it

8. permitted the jury to take into consideration certain elements not warranted by the law. We do not think the instruction is open to the construction appellant seeks to place upon it. The evidence shows that appellee's arm was crushed and had to be amputated and that he was otherwise injured. The instruction limits the recovery to compensatory damages as shown by the evidence, and authorizes the jury to take into account *only* "his crippled and maimed condition, and the nature, extent and duration thereof, the physical and mental pain he has suffered by reason of his said injuries, the length of time he was confined to his bed or room unable to work by reason of said injury; the diminution, if any, of his earning capacity, (and) the probable duration of his life."

These were proper elements to be considered by the

jury, and the court did not err in giving said instruction.

Several instructions were tendered by appellant and refused by the court upon which appellant predicates error. These instructions are drawn either on the assumption that certain facts were undisputed, or on an erroneous construction of the law, and are fully disposed of by our discussion of appellant's objections to instructions given.

It is also contended that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. Inasmuch as the evidence may not be the same on a retrial, we deem it unnecessary to discuss these questions.

Because of the errors in the instructions and in view of the apparent confusion as to the law applicable to the case made by the complaint, justice we believe demands an opportunity for a new trial. The judgment is reversed, with instructions to grant appellant's motion for a new trial, and for further proceedings consistent with this opinion.

NOTE.—Reported in 117 N. E. 504. Mines and mining: violation of mining act, employe's right of action, 9 L. R. A. (N. S.) 382, L. R. A. 1915E 557; duty of mine proprietor to provide safe place for employes to work, 87 Am. St. 564; liability of owner to servant for injuries caused by the falling of the mine roof, Ann. Cas. 1912B 577.

IN RE BOYER.

[No. 10,076. Filed October 25, 1917.]

1. **STATUTES.**—*Construction.*—*Scope and Purpose.*—In construing an act of the legislature the courts may take into consideration the general scope and purpose of the act and the condition that prevailed at the time of its passage. p. 410.
2. **MASTER AND SERVANT.**—*Workmen's Compensation Act.*—*Construction.*—The Workmen's Compensation Act, Acts 1915 p. 392,

includes employes in all industrial pursuits, except those expressly exempted by §9 of the act. p. 411.

3. **MASTER AND SERVANT.**—*Workmen's Compensation Act.*—*Construction.*—*Scope.*—*Farm or Agricultural Laborers.*—One employed as a separator man on a threshing outfit that travels from farm to farm and is owned and operated as a business is not a farm or agricultural laborer within the meaning of §9 of the Employers' Liability Act, Acts 1915 p. 392, which exempts such laborers from the benefits of the act. p. 411.

From the Industrial Board of Indiana.

Certified questions of law.

Proceedings under the Workmen's Compensation Act in the matter of one Boyer. Certified questions of law by the Industrial Board. *Questions answered.*

HOTTEL, C. J.—The Industrial Board of Indiana has certified to this court, under §61 of the Workmen's Compensation Act (Acts 1915, ch. 106, p. 392) the following statement of facts, and questions of law based thereon:

"On the 16th day of July, 1917, and for many years prior thereto, Edward A. Lane was the owner of a wheat and oats threshing equipment, consisting of a traction engine, a separator and a straw blower, which he operated upon the custom basis in threshing wheat and oats for farmers in the eastern part of Boone, and the western part of Hamilton counties, in the State of Indiana; that said threshing outfit was moved from farm to farm by said Lane, and the wheat and oats of the farmers threshed at so many cents per bushel; that in the operation of said threshing equipment the said Lane had William Boyer in his employment, for a number of years as one of the separator hands, at an average weekly wage of \$18.00; that on the 16th day of July, 1917, the said Lane was threshing wheat, with said equipment, for a Hamilton county farmer, and at said time William Boyer was working under his em

ployment as one of the separator hands; that on said date, while engaged in the discharge of the duties of his employment, the right hand of William Boyer was caught in the cylinder and his arm drawn into the machine and his arm crushed off above the elbow joint. Boyer claims compensation for two hundred weeks at the rate of \$9.90 a week, on account of the loss of his arm. Lane admits that he is entitled to compensation at said rate and for said period, if the Indiana Workmen's Compensation Act applies."

Upon the foregoing facts, the Industrial Board certifies for our determination the following questions of law: "1. Is William Boyer, upon the foregoing facts, entitled to an award of two hundred weeks' compensation at the rate of \$9.90 per week, against Edward A. Lane? 2. Upon the foregoing facts was William Boyer a farm laborer, within the meaning of the Indiana Workmen's Compensation Act, at the time of his injury?"

The question presented is controlled by that part of §9, of the compensation act, *supra*, which provides as follows: "This act * * * shall not apply to casual laborers, to farm or agricultural laborers and to domestic servants, nor to employers of such persons: * * *."

Under the facts above stated, Was Mr. Boyer at the time of his injury employed as a farm or agricultural laborer within the meaning of said provision?

In construing or interpreting an act of the legislature the courts may take into consideration the general scope and purpose of the act and the condition

1. that prevailed at the time of its passage. *Board, etc. v. Given* (1907), 169 Ind. 468, 483, 80 N. E. 965, 82 N. E. 918; *Hughes v. Indiana Union Trac-tion Co.* (1914), 57 Ind. App. 202, 105 N. E. 537, and cases cited.

The purpose of the act, as indicated by its title, was to prevent industrial accidents, and to provide compensation and adequate medical and surgical

2. care for those injured by accident while engaged in industrial pursuits. It is manifest that the purpose of the act was to include within its benefits employes in all industrial pursuits, except those expressly mentioned in the exemption proviso, *supra*.

While the threshing of wheat may be a part of the work necessary to be done on the farm, the farmer himself rarely does it. On the contrary, he has

3. it done by some one who is specially equipped with the machinery necessary to do this kind of work. Wheat threshing is a business or industrial pursuit in and of itself, entirely separate and independent of farming. We apprehend that it would not be contended that the employe of the miller employed in grinding the farmer's wheat into flour, while so engaged, is doing farm or agricultural work. Yet, as affecting the question of what relation the labor of their employes sustains to that of the farm, or agriculture in general, we can see little if any difference between the thresher and the miller. They each have to do with getting the farm product ready for consumption. It is true the miller's work is a step further removed from the farm, but each is engaged in a business, separate from and independent of the farm, which requires machinery, equipment and labor peculiar to the business, and not ordinarily required on or incident to farm work. The only difference between the occupations which suggests itself to our minds as one that might be urged as affecting the question whether each of the two occupations is separate and independent of that of the farm, and whether the labor of their employes, while employed to assist in the operation of such respective businesses, is farm labor, is the fact that the

thresher goes to the farm to thresh the farmer's wheat, while the farmer takes his wheat to the miller to get it ground into flour. If this difference in the place of doing the work can furnish a sufficient reason for characterizing the work of the thresher as farm work, and that of the miller as some other kind of work, then all the miller would have to do to become a farmer would be to place his mill on wheels and go to the farmer to grind his wheat, and the thresher will cease to be engaged in farm work as soon as he requires the farmer to bring his wheat to him for threshing. We do not think the separation and independence of a business or occupation from that of a farmer can be made to depend on such a distinction.

If farmers generally owned threshing outfits and were in the habit of threshing their own grain, and the claimant had been employed by the farmer to assist in the work of threshing, and had been injured while doing such work, a more serious question would be presented. However, if a custom such as that indicated had prevailed among farmers at the time of the enactment of the law in question, the legislature might have made an exception to the proviso, *supra*, which exempts all farm laborers, and those employing them, from the operation of said act.

In our investigation of this question we have been unable to find many jurisdictions in which it has been determined, and in a few of those in which we have found it determined a conclusion different from that which we have reached is indicated. *Sylcord v. Horn* (1917), 179 Iowa 936, 162 N. W. 249. There are, however, cases in other jurisdictions which support our conclusion. We think the latter cases are supported by the better reason, and hence prefer to follow them. *White v. Loades* (1917), 178 App. Div. 236, 164 N. Y.

Supp. 1023. We therefore conclude that the first question of law propounded by the Industrial Board should be answered in the affirmative, and that the second question should be answered in the negative.

NOTE.—Reported in 117 N. E. 507. Workmen's Compensation Act: who is a farm laborer under the act, L. R. A. 1917D 147.

WORKMAN v. RHODES.

[No. 9,324. Filed October 30, 1917.]

1. APPEAL.—*Presenting Questions for Review.—Ruling on Motion for New Trial.—Grounds.*—That the finding of the court is not fairly supported by the evidence, the finding of the court is clearly against the weight of the evidence, the judgment is clearly against the weight of the evidence, and the judgment is contrary to law, are not recognized by the statute as grounds for a new trial, and will not be considered on appeal. p. 414.
2. APPEAL.—*Review.—Evidence.—Weight and Sufficiency.*—Where the record discloses that there was legal evidence to support the decision of the trial court, the court on appeal will not weigh the evidence to determine its preponderance in order to reverse the judgment. p. 414.

From Martin Circuit Court; *James W. Ogdon*, Judge.

Action by Ott Workman against Elvett B. Rhodes. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Frank E. Gilkison, for appellant.

Hiram McCormick, for appellee.

BATMAN, J.—Appellant filed his complaint against appellee in two paragraphs, the first being on a promissory note and the second on an account. Issues were joined by an answer in general denial. Trial was had by the court, with finding for appellee and judgment accordingly. Appellant filed his motion for a new trial, which was overruled, and this action of the trial court

is the only error properly assigned in this court and relied on for reversal.

In appellant's motion for a new trial the following reasons are assigned therefor: (1) The finding of the court is not sustained by sufficient evidence. (2) The finding of the court is contrary to law. (3) The finding of the court is not fairly supported by the evidence. (4) The finding of the court is clearly against the weight of the evidence. (5) The judgment is clearly against the weight of the evidence. (6) The judgment is not fairly supported by the evidence. (7) The judgment is contrary to law.

Of such reasons so assigned for a new trial, the third, fourth, fifth, sixth and seventh are not such as the statute recognizes, and will not be considered.

1. *Baltimore, etc., R. Co. v. Daegling* (1902), 30 Ind. App. 180, 65 N. E. 761; *Gates v. Baltimore, etc., R. Co.* (1899), 154 Ind. 338, 56 N. E. 722; *Lynch v. Milwaukee Harvester Co.* (1902), 159 Ind. 675, 65 N. E. 1025; *Schilling v. Quinn* (1912), 178 Ind. 443, 99 N. E. 740; *Hillel v. Buettner Furn., etc., Co.* (1916), 62 Ind. App. 481, 113 N. E. 12; *Kober v. Boyce* (1917), 64 Ind. App. 677, 114 N. E. 891.

The only question raised by appellant under the remaining reasons for a new trial relate to the sufficiency of the evidence, which was almost wholly oral.

2. An examination of the record discloses that there was legal evidence heard by the trial court on which to base its decision. Under such circumstances this court will not weigh the evidence for the purpose of determining where the preponderance lies, in order to reverse the judgment. *Beavers v. Bess* (1914), 58 Ind. App. 287, 108 N. E. 266; *Vandalia R. Co. v. House* (1914), 59 Ind. App. 10, 108 N. E. 872; *Nicholson v. Smith* (1915), 60 Ind. App. 385, 110 N. E. 1007; *Dorrell v. Herr* (1915), 184 Ind. 445, 111 N. E. 614.

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We find no available error in the record. Judgment affirmed.

NOTE.—Reported in 117 N. E. 526.

TRINKLE ET AL. v. LADOGA BUILDING LOAN FUND
AND SAVINGS ASSOCIATION.

[No. 9,416. Filed October 30, 1917.]

1. **PRINCIPAL AND SURETY.**—*Suretyship.*—*Nature of Obligation.*—A surety is one who becomes bound simply for the accommodation of his principal and receives no consideration for the favor he bestows, the test of suretyship being the receipt of the consideration. p. 422.
2. **HUSBAND AND WIFE.**—*Loans.*—*Wife as Principal.*—In an action against husband and wife to recover on a promissory note and to foreclose a mortgage, if the money was paid to her and her husband, and was used by them to purchase real estate held by them jointly as tenants by the entireties, she is not a surety but a principal. p. 422.
3. **HUSBAND AND WIFE.**—*Liability on Notes.*—*Judgment.*—Where a husband and wife received the consideration for their promissory note jointly, and applied it on the purchase price of realty held by them by the entireties, the lender is entitled, in an action on the note and to foreclose a mortgage, to a judgment against both husband and wife and to a decree of foreclosure against the real estate. p. 422.
4. **PLEADING.**—*General Denial.*—*Evidence Admissible.*—In an action to recover on a promissory note, all the facts pleaded in plaintiff's reply tending to contradict defendant's claim that she is surety for her husband were admissible under the general denial. p. 423.
5. **APPEAL.**—*Review.*—*Ruling on Demurrer.*—Where a paragraph of reply, to which a demurrer was overruled, pleaded facts admissible under the general denial, and also invoked the principle of estoppel, and the theory of the court's general finding for plaintiff cannot be ascertained, the court on appeal must determine the sufficiency of the reply on the theory of estoppel before it can say whether the ruling on defendant's demurrer was harmless. p. 423.
6. **ESTOPPEL.**—*Pleading Specially.*—Matters in estoppel must be pleaded specially. p. 423.
7. **HUSBAND AND WIFE.**—*Notes.*—*Wife as Surety.*—*Liability.*—Generally, an obligor cannot plead suretyship as against the obligee unless the latter had notice of the fact of suretyship at

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the time of entering into the contract, but where the obligor is a married woman, one who contemplates loaning money to her is bound to make inquiry concerning the facts bearing on the question of suretyship. p. 423.

8. HUSBAND AND WIFE.—*Loan to Wife.—Suretyship.—Duty of Obligee to Make Inquiry.*—Where one contemplating loaning money to a married woman makes due inquiry, in good faith, to ascertain whether the money is to be for her use and benefit, he may rely on her representations that she is not a surety. p. 424.
9. HUSBAND AND WIFE.—*Loans to Wife.—Statute.—Scope and Applicability.*—Section 7856 Burns 1914, Acts 1903 p. 394, providing that a married woman who executes and delivers her promissory note or other evidence of indebtedness for the purpose of securing a loan, and states under oath that the money is to be for her own separate use or the betterment of her property or separate business, shall not be permitted thereafter to claim that such loan was made for the use and benefit of any person other than herself, has no application to transactions wherein the proceeds of a loan to a married woman are not paid in cash, or by check or draft payable to her order. p. 425.
10. HUSBAND AND WIFE.—*Loan to Wife.—Statute.—Construction.*—Section 7856 Burns 1914, Acts 1903 p. 394, providing that when a married woman shall borrow money on her note and the proceeds of the loan shall be paid to her in cash, or by check or draft payable to her order, and she makes affidavit that the money is for her own use, she shall not be permitted to thereafter claim that the loan was made for the use and benefit of any person other than herself, is, within its scope, merely declaratory of the common law, and does not abrogate the prior statute (§7853 Burns 1914, §5117 R. S. 1881), providing that a married woman shall be bound by an estoppel *in pais* like any other person. p. 425.
11. HUSBAND AND WIFE.—*Loan to Both.—Wife's Liability.—Wife's Representations.—Estoppel.*—Where a married woman, for the purpose of inducing another to grant her a loan, makes representations in an affidavit to the effect that the money is for her own use and benefit and that she is not a surety, and her representations are acted upon in good faith, she is estopped thereafter from setting up that she is surety and therefore not liable, even though the transaction does not come within the provisions of §7856 Burns 1914, Acts 1903 p. 394, relating to loans to married women. p. 425.

From Montgomery Circuit Court; Jere West, Judge

Trinkle v. Ladoga Building, etc., Assn.—65 Ind. App. 415.

Action by the Ladoga Building Loan Fund and Savings Association against Christopher C. Trinkle and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Albert D. Thomas, Andrew N. Foley and Nina Lindley, for appellants.

Robert W. Marks and Chase Harding, for appellee.

DAUSMAN, J.—Appellee instituted this action to recover on a promissory note and to foreclose a mortgage given to secure the note, both instruments having been executed by appellants Christopher C. Trinkle and his wife, Alice Trinkle. Appellant Everett Harris was made a party for the sole reason that he was occupying a building on the real estate described in the mortgage as tenant of the Trinkles.

Alice Trinkle filed her answer in two paragraphs, the substance of which is that at the time of the execution of the note and mortgage she was the wife of Christopher C. Trinkle; that she and her husband then were, and ever since have been, the owners of said real estate as tenants by the entireties; that no part of the consideration for the note and mortgage was paid to her in cash or by check or draft payable to her order; that no part of said consideration was for her separate use or for the betterment of her separate property or business, or for the joint use of herself and husband; that said note and mortgage were given for money borrowed by her husband, and that said money was paid over to him; and that she executed the note and mortgage as surety for her husband, and not otherwise.

To her answer the association filed a reply in three paragraphs, numbered 1, 2 and 5. The first is a general denial. The second paragraph is in the following words: "The plaintiff for a second and further para-

graph of its reply to the second and third paragraphs of the separate answer of the defendant, Alice Trinkle, herein, says that at the execution of the note and mortgage sued upon in the plaintiff's complaint, the defendant, Alice Trinkle, and her co-defendant, Christopher C. Trinkle, made an application to this plaintiff for a loan of seven hundred (\$700.00) Dollars and for which loan made by this plaintiff to them said Alice Trinkle and her co-defendant, Christopher C. Trinkle, executed said note and mortgage in suit; that at the time of making said application the said Alice Trinkle and her co-defendant, Christopher C. Trinkle, made and filed therewith an affidavit, duly sworn to by each of them, before an officer authorized to administer oaths, and which said affidavit is in the words and figures following, to wit:

"Affidavit

"State of Indiana, Montgomery County, SS:

"Christopher C. Trinkle and Alice Trinkle being duly sworn upon their oaths say they are over 21 years of age. That they are the owners of the real estate proposed to be mortgaged by them to the Ladoga Building Loan Fund and Savings Association, to secure a loan of \$700.00 situate in Montgomery County, Indiana, described in their application for a loan hereto attached, dated March 14, 1912, and that they are in possession thereof. "Affiants further say that they have not conveyed said Real Estate or any part thereof. That they have not encumbered the same or any part thereof by mortgage, vendor's lien, mechanic's lien, lease or otherwise, except as hereinafter stated. That they have not become replevin bail. There are no judgments against them nor suits pending against them; that no judgment against them has been paid by surety or replevin bail. That the premises have not nor has any part thereof been sold upon any mortgage to the Congressional School Fund. That there is no unredeemed tax sale against the property or any part of it, nor sale

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for street nor other municipal assessments. That the only encumbrance on the property is nothing.

“That the money obtained by said loan will be used to pay the purchase price of real estate conveyed to Christopher C. Trinkle and Alice Trinkle, his wife, as tenants by entirety. No part of said \$700.00 will be used for the benefit of any other person except Alice C. Trinkle.

“That Christopher C. Trinkle and Alice Trinkle make this affidavit for the purpose of inducing the said Ladoga Building Loan Fund and Savings Association to make them a loan of \$700.00.

“(Signed) Christopher C. Trinkle

“Alice Trinkle.

“Subscribed and sworn to by Christopher C. Trinkle and Alice Trinkle before the undersigned John Harrigan, a Notary Public in and for said County and State, this 16th day of March, 1912.
(SEAL) My Commission Expires April 7, 1914.”

“The plaintiff says that it had no knowledge of the use to which said loan was to be put; that it knew nothing of the circumstances and condition of said Alice Trinkle and her codefendant, Christopher C. Trinkle; that relying upon said representations and believing them to be true, and believing that the said Alice Trinkle and her codefendant, Christopher C. Trinkle, were procuring said loan for the purpose of paying the purchase price of said real estate described in the plaintiff's complaint and that no part of said money was to be used for the benefit of her husband or any other person, but that the entire sum was to be used for the use and purpose set out in said affidavit, this plaintiff did make said loan to said Alice Trinkle and her codefendant, Christopher C. Trinkle, and took their mortgage and note therefor.”

The substance of the fifth paragraph is as follows: That the Trinkles filed with the association their joint application for a loan of \$700; that said application

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was accompanied by their joint affidavit in which they stated, among other things:

“That the money obtained by said loan will be used to pay the purchase price of real estate conveyed to Christopher C. Trinkle and Alice Trinkle, his wife, as tenants by entirety. No part of said \$700.00 will be used for the benefit of any other person except Alice Trinkle. That Christopher C. Trinkle and Alice Trinkle make this affidavit for the purpose of inducing the said Ladoga Building Loan Fund and Savings Association to make them a loan of \$700.00.”

That the association had no knowledge of the use to which said loan was to be put, other than as stated in said affidavit; that it knew nothing of the circumstances and condition of the Trinkles other than the information derived from their representations; that, relying upon their representations and believing them to be true, the association made said loan to them and took their note and mortgage therefor; that the Trinkles, at and prior to the procuring of the loan and prior to the execution of the note and mortgage, were represented by their agent Charles W. Ross; that in the negotiations the association had no dealings direct with the Trinkles or either of them and did not know either of them, but relied wholly upon the statements made by their agent

- and upon the statements contained in their said affidavit; that the Trinkles, through their said agent, represented to the association that the purpose in procuring the loan was to pay the purchase price of the real estate to be mortgaged by them, which real estate was owned by them jointly as tenants by the entireties; that at the request and under the directions of the Trinkles the money constituting the loan was paid to them jointly; that said payment was made by check payable “to the order of Chas. W. Ross, Agent, * * * For Completion of Loan, Christ. C. Trinkle and Wife”;

that said check was in the sum of \$684.95, being the full amount of the loan less the cost of procuring and examining an abstract of title and other incidental expenses, all of which the Trinkles had agreed to pay; that in truth said check was payable to the order of Alice Trinkle and Christopher C. Trinkle; and that the proceeds of said check were paid to the Trinkles by their agent and that they jointly received the full amount thereof and that it was actually used for the benefit of their joint real estate held by them as tenants by the entireties. Wherefore, plaintiff says that defendants, and each of them, are, by their acts and representations and the facts aforesaid, estopped," etc.

To the second and fifth paragraphs of reply Alice Trinkle demurred on the ground that neither paragraph states facts sufficient to avoid her defense. In the memorandum accompanying her demurrer two objections are pointed out, viz.: (1) That it is not averred that the money loaned was paid to Alice Trinkle in cash or by check or draft payable to her order; (2) that the reply affirmatively shows that the money loaned was not paid to Alice Trinkle in cash or by check or draft payable to her order, but was paid by check payable to the order of Charles W. Ross, agent. Her demurrer was overruled as to each paragraph. Christopher C. Trinkle filed his answer in which he averred the same facts averred in the answer filed by his wife, claiming that because the mortgage is void as to her it cannot be foreclosed against him. To his answer the association replied in two paragraphs, numbered 3 and 4. The third is a general denial, and the fourth avers the same facts averred in its second paragraph of reply to the answer of Alice Trinkle. To the fourth paragraph of reply Christopher C. Trinkle demurred on the identical grounds stated in the demurrer filed by his wife. His demurrer was overruled. The court made a general

finding for the association, and rendered personal judgment against both the Trinkles and a decree of foreclosure. The overruling of each demurrer is assigned as error.

It will be observed that the fifth paragraph of the reply to the answer of Alice Trinkle has a double aspect. The facts therein stated controvert her claim that she executed the note and mortgage as surety for her husband, and they also invoke the equitable principle of estoppel. In disposing of the controversy between the parties the primary question to be determined by the trial court was, Did Alice Trinkle execute the note and mortgage as surety? The question of estoppel is entirely secondary; for if in truth she did not execute the note and mortgage as surety, then there is no occasion to invoke the principle of estoppel. Whether she is surety or a principal is to be determined from the facts. A surety is one who becomes bound

1. simply for the accommodation of his principal and receives no consideration for the favor he bestows. The test of suretyship is the receipt
2. of the consideration. If the money was paid to her and her husband, and was used by them to pay the purchase price of real estate held by them jointly as tenants by the entireties, then she is not a surety, but a principal. *Harbaugh v. Tanner* (1904), 163 Ind. 574, 71 N. E. 145; *Union Nat. Bank v. Finley* (1913), 180 Ind. 470, 103 N. E. 110. Under the facts averred in the reply she and her husband are joint principals. In contemplation of law each received the entire consideration and neither is surety for the
3. other. Having received the consideration jointly, and having applied it on the purchase price of the real estate held by them by the entireties, the lender is entitled to a judgment against both husband and wife and to a decree of foreclosure against said real estate.

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Sharpe v. Baker (1912), 51 Ind. App. 547, 96 N.E. 627, 99 N. E. 44; *Union Nat. Bank v. Finley*, *supra*. Now,

it so happens that all the facts averred in said

4. fifth paragraph tend to contradict the wife's claim that she is surety for her husband, and therefore they were all admissible under the gen-

5. eral denial. *Balue v. Sear* (1891), 131 Ind. 301, 28 N. E. 707. At this point we might dispose of

the controversy as to said fifth paragraph on the ground that since the facts alleged therein were admissible under the general denial she could not have been injured by the overruling of her demurrer thereto, were

it not for the rule which requires that matter in

6. . estoppel must be specially pleaded. *Webb v. John Hancock, etc., Ins. Co.* (1903), 162 Ind. 616, 69

N. E. 1006, 66 L. R. A. 632. If the duplicity of said fifth paragraph had been pointed out and a separation required (Works' Practice §494), or if a special finding had been made, the situation would have been simplified. As it is, we cannot know on which theory the finding rests. Therefore we are called upon to determine whether the said fifth paragraph is good on the theory of estoppel. Assuming, then, that in truth she is surety for her husband, is she estopped from taking advantage of the fact of suretyship to the injury of the appellee? The estoppel, if any, must arise out of the fact that her conduct, by which she induced the association to make the loan, was of a character to mislead and deceive, and in fact did mislead and deceive the association. 2 Pomeroy, Eq. Jurisp. (3d ed.) §801 *et seq.*

The general rule is that an obligor cannot plead suretyship as against the obligee unless the obligee had notice of the fact of suretyship at the time of

7. entering into the contract. But this rule does not apply where the obligor is a married woman.

One who contemplates loaning money to a married woman is bound to make inquiry concerning the facts bearing on the question of suretyship. But, having made due inquiry, he may rely on her statements

8. and representations, and act accordingly. He is not required to assume a sort of guardianship over her and see to it, at his peril, that the fund is ultimately and providently applied to her use and benefit. Of course, the transaction throughout, like any other transaction, must be characterized by good faith. *Vogel v. Leichner* (1885), 102 Ind. 55, 1 N. E. 554. This was the law when the legislature enacted the following statute, being §7856 Burns 1914, Acts 1903 p. 394: "That any married woman who shall hereafter execute her promissory note, bond or other evidence of indebtedness, and deliver the same to any person, firm or corporation for the purpose of securing a loan, and such person, firm or corporation shall make such loan and shall pay the proceeds thereof to such married woman in cash, or by check or draft drawn payable to her order, and such married woman shall state under oath in writing the purpose for which such borrowed money is to be used, and if such affidavit shall show the same to be for her own separate use or the betterment of her property, or separate business, she shall not be permitted thereafter to claim that such loan was made for the use or benefit of any person other than herself."

It appears from Alice Trinkle's answer, from said fifth paragraph, from the memorandum filed with the demurrer, and from the briefs of both parties, that this statute is the source of all the strife in this case. Counsel for appellants contend that the facts averred in said fifth paragraph do not bring the transaction within the statute, and that therefore there can be no estoppel. Counsel for the appellee contend that the facts averred therein do bring the transaction within the statute, and

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further contend that said facts are sufficient to constitute an estoppel *in pais* regardless of the statute. The

statute is narrow in its scope and has no application to transactions wherein the proceeds of the loan is not paid "in cash, or by check or draft drawn payable to her order." *Union Nat. Bank v. Finley, supra*. If the consideration for her obligation had been paid to her, in good faith, in the form of a certificate of deposit, or Liberty Bonds, or real estate, or any other kind of property, would her status thereby be altered?

What does the mere form in which the consideration happens to be passed have to do with the equitable principle of estoppel? Surely it must be held that this statute, within its scope, is merely declaratory of the law as announced by the Supreme Court prior to its enactment; that the legislature did not intend thereby to abrogate the law of estoppel in all cases not within the statute; and that the prior statutory declaration that a married woman "shall be bound by an estoppel *in pais* like any other person" still stands as the law of this state. §7853 Burns 1914, §5117 R. S. 1881; *Indianapolis Brewing Co. v. Behnke* (1907), 41 Ind. App. 288, 81 N. E. 119.

The main reason for enacting the statute forbidding married women to enter into contracts of suretyship was to prevent them from squandering their property as sureties for improvident husbands. *Harbaugh v. Tanner, supra*. But a married woman will not be permitted to use this disability (privilege) as a shield to protect her in the perpetration of fraud. She will be held to the same degree of honesty and fair dealing that is required of others. *Kelley v. York* (1915), 183 Ind. 628, 109 N. E. 772. Where for the purpose of inducing

another to grant her a loan she makes representations concerning the matter of suretyship in the form of a solemn affidavit, and her repre-

sentations are acted upon in good faith, she cannot be permitted to avoid her obligation on the ground that her sworn statements are false, even though the transaction does not come within the provisions of §7856, *supra*. In view of the facts averred in said fifth paragraph, to permit the Trinkles to defeat the loan association would be a reproach to the law and a travesty on justice. We hold therefore that said fifth paragraph is good on the theory of estoppel, not because the transaction comes within said §7856, *supra*, but independently of said section.

From what we have said concerning said fifth paragraph, it follows that the facts averred in each of the second and fourth paragraphs of the reply are also sufficient to constitute an estoppel, regardless of the provisions of §7856, *supra*. The court did not err in any of the rulings on said demurrers.

Judgment affirmed.

NOTE.—Reported in 117 N. E. 542. Husband and wife: representations of wife, estoppel, 57 Am. St. 178; right to defend on ground of wife's suretyship in execution of incumbrance on property held by entireties to secure husband's debt, 66 L. R. A. 637. See under (7-10) 21 Cyc 1346.

IN RE DENTON. IN RE GOOD.

[No. 10,024. Filed October 30, 1917.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Construction.—Permanent Partial Disability.—Loss or Impairment of Member.*—Where, in an accident, an employe suffers the loss of a member or the destruction of a physical sense for which provision is specifically made by §31 of the Workmen's Compensation Act, Acts 1915 p. 392, or suffers an injury resulting in permanent partial disability for which provision is not specifically made by that section, compensation must be awarded under such section, and, when so awarded it is in lieu of all other compensation for the particular permanent partial disability, but the section does not by its terms exclude compen-

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sation for other injuries sustained in the same accident for which provision is made by other sections of the act, nor does it purport to cover cases of the loss of two or more members of a particular class, unless the injury results only in a permanent partial disability. p. 430.

2. **MASTER AND SERVANT.**—*Workmen's Compensation Act.—Compensation.—Temporary Total Disability and Permanent Partial Disability.*—Where an employe, in one accident, suffers an injury producing a permanent partial disability, such as the loss of an arm or impairment in its use, and also a distinct injury resulting in temporary total disability, neither §31 of the Workmen's Compensation Act, Acts 1915 p. 392, governing awards of compensation for permanent partial disability, nor any other provision of the act, bars the injured employe from obtaining additional compensation for temporary total disability, as provided in §29. p. 431.

3. **MASTER AND SERVANT.**—*Workmen's Compensation Act.—Compensation for Concurrent Disabilities.—Payment.—Consecutive Running of Periods.*—Where an employe is entitled to compensation, under the Workmen's Compensation Act, Acts 1915 p. 392, for a permanent partial disability, governed by §31, and also for temporary total disability, under §29, the injuries being sustained in the same accident, compensation should be awarded at the rate of fifty-five per cent. of the average weekly wages, and the periods should run consecutively, but not to extend beyond 500 weeks, and the total amount of compensation should not exceed \$5,000. p. 438.

From the Industrial Board of Indiana.

Proceedings under the Workmen's Compensation Act in the matter of one Denton and one Good. Certified questions of law by the Industrial Board. *Questions answered.*

CALDWELL, J.—The facts in the Denton case pending before the Industrial Board, as certified to this court, are in substance as follows: On September 2, 1915, Denton, an employe of the Union Hominy Company, suffered in one and the same accident the following physical injuries: First, an injury to the left arm necessitating, and resulting in, its amputation above the elbow joint; secondly, a fracture of the sacrum, one of the pelvic bones. The results of the fracture of the

sacrum have been as follows, as certified by the board: Denton was confined to his bed for nine months and to the hospital for twelve months. Since the accident and by reason of the fractured sacrum, he has continuously been unable to work. He is improving, and in all probability will be sufficiently recovered from said fracture to do work of a light character at the end of 100 weeks from the date of the injury, and at the end of 150 weeks from the date of the injury he will probably be completely recovered from the fracture. The circumstances are such as to entitle Denton to compensation under the Workmen's Compensation Act. (Acts 1915 p. 392). In our discussion of this case, we shall assume that probabilities are reduced to certainties, and that there was a partial recovery from the effects of the fracture at the end of 100 weeks, and that there will be a complete recovery at the end of 150 weeks, as indicated.

The facts in the Good case are in substance as follows: On May 15, 1916, Good, an employe of the Dairy Queen Manufacturing Company, suffered in one and the same accident the following physical injuries: First, dislocation of right elbow joint and certain fractures of the right arm and forearm, as a result of which there is a seventy-five per cent. permanent impairment of the use and function of said arm; secondly, a fracture of the surgical head of the right femur, as a result of which fracture of the femur Good was totally disabled for work for a period of twenty-two weeks. The circumstances are such as to entitle Good also to compensation under the Workmen's Compensation Act, *supra*.

Under the provisions of §31 of the Workmen's Compensation Act, *supra*, the Industrial Board propounds to this court the following question, seeking our opinion for guidance in determining said cases. 1. Is Denton

entitled to compensation for 200 weeks for the loss of his arm, and also to compensation for the period of disability beyond fourteen days resulting from the fracture of the sacrum? 2. Is Good entitled to compensation for the seventy-five per cent. permanent impairment of the use of his right arm, and also to compensation for the period of disability beyond fourteen days, resulting from the fracture of the femur?

In each of these cases we are required to deal with a permanent partial disability, based on the loss or impairment of a member, and also with a temporary total disability, based on an injury to a distinct member, both disabilities in each case resulting from injuries suffered in one and the same accident. While it is probable that the injury in each case that resulted in such permanent partial disability contributed also to produce total disability for a time, the statement of facts is to the effect that the fracture of the sacrum in the one case and the fracture of the femur in the other case produced such total disability.

Section 31 of the Workmen's Compensation Act, *supra*, is in part as follows: "For injuries in the following schedule the employe shall receive in lieu of all other compensation a weekly compensation equal to fifty-five per cent. of his average weekly wages for the periods stated against such injuries respectively, to-wit: (a) For the loss by separation of not more than one phalange of a thumb * * * 15 weeks. * * * (h) For the loss by separation of one arm at or above the elbow joint 200 weeks. * * * In all other cases of permanent partial disability * * * compensation in lieu of all other compensation shall be paid when and in the amount determined by the Industrial Board, not to exceed fifty-five per cent. of average weekly wages per week for a period of two hundred weeks."

It will be observed that §31 deals only with injuries

which result in permanent partial disability: First, with such a disability based on the loss of a member, as one thumb, finger, arm, eye, etc., or the destruction of the physical sense of hearing. For such a disability based on the loss of a member or the destruction of such physical sense, specifically mentioned, there is provided in each case a fixed period of compensation ranging from fifteen weeks to 200 weeks. The section recognizes that there may be cases of permanent partial disability other than those based on injuries specifically mentioned, as, among others, the loss of more than one member of a given class, or the permanent impairment of a member, and as to any such other case the section authorizes the board to fix the period of compensation not exceeding 200 weeks, however. Compensation when so fixed is exclusive of all other compensation for the specific injury that results in permanent partial disability, even though such injury results immediately in temporary, but not permanent, total disability. Where, in an accident, an employe suffers the loss of a member or the destruction of a physical sense for which provision is specifically made by §31, or suffers an injury resulting in permanent partial disability for which provision is not specifically made by said section, compensation must be awarded under that section, and when so awarded it is "in lieu of all other compensation" for the particular permanent partial disability. The section does not by its terms exclude compensation for other injuries suffered in the same accident for which provision is made by other sections of the act (*Marhoffer v. Marhoffer* [1917], 220 N. Y. 543, 116 N. E. 379), nor does it purport to cover cases of the loss of two or more members of a particular class, as two eyes, two hands, two or more fingers, etc., unless the injury results only in a permanent partial disability. In the latter case the

general provisions of the section are applicable. Specifically, Denton is entitled under §31 to compensation for 200 weeks for the loss of his arm, and Good under that section is entitled to compensation for such reasonable time as may be fixed by the board for the permanent partial impairment of his arm, but there is nothing in the terms of §31 that excludes the former's right to compensation based on the disability caused by the fracture of his sacrum, or the latter to compensation based on the disability resulting from the fracture of his femur.

It is apparent from a consideration of the act that had Denton suffered no other injury than the fractured sacrum, and Good no other than the frac-

2. tured femur, resulting in each case in a temporary total disability, as certified by the board, each would be entitled to compensation under certain sections of the act other than §31. If, then, Denton and Good are not entitled to compensation respectively for the temporary total disability involved in the case of each respectively, it must be by reason of the permanent partial disability also involved and the compensation provided therefor by §31. It will be observed that the period of total disability in the Denton case, resulting from the fractured sacrum, is shorter than the period of compensation fixed by §31 for the loss of Denton's arm, and also that in the Good case, the period of total disability resulting from the fractured femur is shorter than the period of compensation that might reasonably be expected to be determined by the board under the general provision of §31 for a seventy-five per cent. permanent impairment of an arm. Under such circumstances, we have determined that §31 does not by its terms purport to bar either Denton or Good from compensation based on the temporary total disability involved in his case. We proceed to the ques-

tion whether any provision found elsewhere in the act or whether its general spirit has such effect.

Section 31, as we have said, is confined to cases of permanent partial disability. It covers all cases of that class. Section 29 deals with all cases of total disability, both permanent and temporary, excepting, however, a temporary total disability that might result from an injury that comes within the provisions of §31, resulting ultimately in a permanent partial disability. Section 29 is to the effect that there shall be paid to the injured workman during total disability, exclusive of the first two weeks, a weekly compensation equal to fifty-five per cent. of his average weekly wages for a period not to exceed 500 weeks. We construe §30 as applicable only to cases of temporary partial disability. Otherwise it is in conflict with the general provisions of §31. Section 30 is to the effect that in cases of partial disability, the injured workman shall be paid "during such disability," exclusive of the first two weeks, but for a period not exceeding 300 weeks, a weekly compensation equal to half of the difference between his "average weekly wages" and the weekly wages at which he is actually employed after the injury. Sections 33 and 35 deal with successive permanent partial disabilities. The former is to the effect that where, in an employment, a workman receives a permanent injury, and subsequently in some other employment he receives another permanent injury, such as is specified in §31 (and consequently a partial injury), he shall be entitled to compensation for the latter in the same amount as if the previous injury had not occurred. The latter section is to the effect that where a workman receives a permanent partial injury, and subsequently receives in the same employment another permanent partial injury, the two injuries not amounting to total permanent disability, he shall be entitled to compensation for

both injuries payable by extending the period rather than by increasing the weekly compensation. Section 34 we construe as follows: Where, while a workman is receiving or is entitled to compensation for some injury, he suffers in the same employment a subsequent injury for which compensation is payable, the injury in neither case being a permanent partial injury such as is covered by §31, "he shall not at the same time be entitled to compensation for both injuries * * * but he shall be entitled to compensation for that injury, and from the time of that injury which will cover the longest period and the largest amount payable under this act."

There is no other section of the act that deals with the subject of the amount and period of compensation for injuries resulting in disability. It is apparent that there is no section directed specifically to such a situation as we have here, where in one and the same accident a workman suffers an injury producing a permanent partial disability such as comes within the provisions of §31, and also a distinct injury resulting in a temporary total disability. Section 31 plainly requires that compensation be awarded for the former. Section 29 just as plainly requires that compensation be awarded for the latter were the situation not complicated by the existence of the former. What is there in either the letter or the spirit of the act that denies compensation for the latter disability based on the mere fact that it arose and existed in conjunction or contemporaneous with the former?

Like questions have been considered by courts of other jurisdictions, operating under statutes similar to, but not identical with, ours. The New York act provides as the sole rate of compensation applicable to all cases two-thirds of the average weekly wages of the

workman involved. As in case of our act, there are certain fixed periods of compensation specified for certain permanent partial disabilities, as the loss of a hand, etc., the period being flexible within limits as to other disabilities, but no compensation being allowed for the first two weeks thereof. In *Fredenburg v. Empire United Rys.* (1915), 168 App. Div. 618, 170 App. Div. 942, 154 N. Y. Supp. 351, a workman suffered the loss of a foot resulting in a permanent partial disability. For such an injury the New York act specifies 205 weeks as the compensation period. In the same accident, the workman suffered other injuries sufficiently serious to disable him totally for sixteen weeks, such injuries not belonging to the class for which fixed periods of compensation were provided. There the Appellate Division of the Supreme Court held that it was proper to award compensation for 205 weeks based on the loss of the foot, but improper to award concurrent compensation based on disability resulting from such other injuries, since to do so would be awarding compensation in excess of the statutory rate of two-thirds of the average weekly wages per week. It is intimated, but not decided, that if at the end of the period of 205 weeks, disability on account of such other injuries should continue, the workman might be entitled to a further award based on such continued disability. In *Marhoffer v. Marhoffer*, *supra*, a workman suffered the loss of a finger, resulting in a permanent partial disability, for which the New York act specified a compensation period of thirty weeks. In the same accident the workman received other injuries resulting in a total disability continuing ten weeks. The industrial commission awarded compensation for eight weeks, based on the latter disability, and also thirty weeks' additional compensation, based on the former disability, to begin at the expiration of the eight-week period. The Court

of Appeals, three justices dissenting, reversed the order of the Supreme Court affirming the award, holding that compensation was improperly awarded for the temporary total disability, and dismissing that claim. The court said: "Concurrent awards and consecutive awards based on separate items of physical impairment, disconnected from earning power, alike ignore the fundamental principle that the basis of compensation is a sum payable weekly for a fixed time during which the employe is actually or presumptively totally or partially disabled and non-productive."

Limron v. Blair (1914), 181 Mich. 76, 147 N. W. 546, Ann. Cas. 1916C 1108, is practically to the same effect as the New York decisions. See criticism in 5 N. C. C. A. 866, note. The New York and Michigan acts are similar to ours in that by each of such acts there is provided but a single rate of weekly compensation applicable to all cases of total disability and permanent partial disability. Such rate under the New York act is $66\frac{2}{3}$ per cent. of the average weekly wages; under the Michigan act, fifty per cent., and under the Indiana act fifty-five per cent. Under each of such acts the compensation period for certain permanent partial disabilities as those resulting from the loss of a foot, or a hand, etc., is specifically fixed, while for injuries resulting in total disability, compensation continues during disability, within certain limits, however, as 500 weeks in Michigan and Indiana. Our interpretation of the decisions to which we have referred is as follows: Where a workman suffers a single injury, such as the loss of a foot, resulting in fact in a permanent partial disability, and for which the governing act fixes a definite and certain period of compensation, as 125 weeks in Michigan, and 205 weeks in New York, the law assumes the equivalent of a total disability for the specified period regardless of the actual duration of the total disability,

that as a consequence, force being given to such assumption, the workman is entitled to compensation for the specified period, although the actual period of total disability is but a few weeks, or many weeks, or during all or more than such specified period; that, if in the same accident, the workman suffers other injuries belonging to a class for which specific periods of compensation are not provided by the act, and if the latter injuries result in total disability for all or a substantial part of the compensation period specified for the former injuries, yet for the latter injuries the workman is not entitled to additional compensation, because the compensation for the former injury is awarded on the assumption of a total disability continued for the specified period, and that as a consequence the assumption embraces the actual total disability resulting from the latter injury; that if the latter injury acting alone or in conjunction with the former results in disability extending beyond the period specified for the former, the workman is entitled to compensation during such disability not exceeding, however, the maximum period fixed by the act.

We are unable to harmonize these decisions with our act. Section 31 provides that for certain injuries there shall be awarded compensation for certain periods definitely fixed, as 200 weeks for the loss of an arm, and for other cases of permanent partial disability, as the permanent impairment of an arm, compensation shall be paid for a period not exceeding 200 weeks, and that compensation so awarded shall be in lieu of all other compensation for the particular injury. This section deals with such injuries not from the standpoint of any total disability that may result temporarily or any disability that may continue through the period fixed by the section, but from the standpoint of the consequent permanent disability, and resulting diminution in earn-

ing power extending through life. The specific portions of the section assume that from the respective scheduled injuries a handicap of a certain gravity will result, for which compensation is arbitrarily fixed, regardless of the actual disability and loss of capacity. Where a workman suffers an injury covered by §31, he is entitled to the compensation fixed by that section, not because of the actual extent of the resulting disability, but because the section so declares. It is possible for a case to arise where the loss of an arm, in the absence of other injuries, may by reason of complications totally disable a workman for more than 200 weeks. His compensation, however, under §31, his total disability not being permanent, would be limited to 200 weeks. It is possible, however, in case of such an injury, that the workman may in a short time be able to follow some line of work in which he may be able to earn substantial wages, possibly equal to his former wages. Nevertheless, under §31, he would be entitled to compensation for 200 weeks, although during a considerable portion of that time he was earning or receiving substantial wages. Such are the limits of the workman's rights under §31. In the same accident, a workman may, as here, suffer not only an injury for which compensation is payable under §31, but also some other injury for which, if it occurred alone, compensation would be awarded under §29. As we have said, the former injury might produce actual loss of earning power for but a short time. The latter, however, of its own force, or in conjunction with the former, might produce total disability terminating only at the expiration of the compensation period fixed by §31 for the former injury, as 200 weeks for the loss of an arm. If it be held that in the assumed case the fact that the workman, under §31, is entitled to compensation for 200 weeks, based on the former injury, shall

deprive him of all compensation based on the latter injury, it appears to us that there is denied the workman a substantial benefit to which he is entitled under the act, and that thereby the "in lieu of all other compensation" provisions of §31 are not confined to injuries covered by such section, but that their scope is extended to injuries for which compensation is provided by §29.

Possibly a workman's compensation act might appear more logical and scientific, possibly more in harmony with a sound economic policy, if compensation in all cases were measured by actual disability and loss of earning capacity, regardless of the nature and number of distinct injuries from which it resulted. Such a construction of our act would force us to ignore §31.

We conclude that both the submitted questions should be answered in the affirmative.

A further problem suggested by, but not included in, the questions submitted, is as follows: Where, as here, compensation must be awarded for two distinct

3. injuries, suffered in the same accident, should the periods of compensation run concurrently or consecutively, under our act? Specifically directing our attention to the Denton case, Denton, as we have said, is entitled to compensation for 200 weeks under the provisions of §31, based on the loss of his arm. It will be the duty of the board to determine as a fact the duration or probable duration of disability produced by the fracture of the sacrum considered apart from his other injury, and thus to determine the period of compensation based on that injury. Such period will apparently be shorter than that fixed for the loss of the arm. The question then is, Should the board award to Denton double compensation—that is, 110 per cent. of his average weekly wages for the shorter period, and single compensation, that is, fifty-five per cent. of his average weekly wages for the residue of the longer period—or

should the two periods be aggregated, the one following the other in effect, and compensation be awarded at the fifty-five per cent. rate for the aggregated period? Our act does not specifically answer this question. We are therefore required to gather from its provisions its general spirit and intent.

It will be observed that with the possible exception of cases of temporary partial disability governed by §30, and cases governed by the latter part of §37, the act fixes but one rate of compensation applicable to all injuries, regardless of the degree or duration of disability. That rate is fifty-five per cent. of the average weekly wages. This rate at any event is the limit of weekly compensation fixed by the act. The amount of compensation is graduated to the quality and quantity of disability by providing a flexible period. The extreme of the period, however, is fixed by §29 at 500 weeks, and the extreme amount of compensation is limited by §40 to \$5,000. This rate of compensation is provided by §29 for cases of total disability, by §31 for cases of permanent partial disability, and by §37 for cases of death resulting from injuries, there being persons totally dependent. Evidently there is back of the act a legislative intent to provide for the injured workman and those dependent on him a weekly compensation sufficient to ward away want, and at the same time to foster a spirit of frugality that, if possible, a subsequent period of destitution may be averted. The purpose was to provide a weekly payment as small as reasonably possible, its smallness to be compensated by a period made as long as reasonably possible. Such intent is indicated, among other particulars, by the provisions of §43, forbidding compensation in a lump sum, except under special circumstances, and then only by action of the board; also by the terms of §35 to the effect that where a workman is entitled to compensation

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for more than one injury under that section, "the total compensation shall be paid by extending the period, and not by increasing the amount of weekly compensation."

To determine that in cases such as are involved here the periods of compensation should run concurrently would, in our opinion, violate the spirit and purpose of the act. It is therefore our judgment that in such cases compensation should be awarded at the fifty-five per cent. rate, and that the periods should run consecutively, but not to extend beyond 500 weeks, and that the total amount of compensation should not exceed \$5,000.

NOTE.—Reported in 117 N. E. 520. Workmen's compensation: total or partial disability, recovery, L. R. A. 1916A 136, 254, L. R. A. 1917D 167. See also note *ante* 365.

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[No. 9,216. Filed April 26, 1917. Rehearing denied June 28, 1917. Transfer denied October 30, 1917.]

1. PLEADING.—*Answers.*—*Allegations in Petition.*—*Admission by Failure to Traverse.*—Facts alleged in a petition for distribution of a decedent's estate must be taken as conceded, where not traversed by answer. p. 446.
2. APPEAL.—*Review.*—*Ruling on Demurrer to Answer.*—*Reversal.*—Where judgment was rendered against plaintiff on his refusal to plead over after the overruling of his demurrers to paragraphs of answer, if any one of such paragraphs is good as against demurrer, it alone is sufficient to support the judgment, and the cause will be affirmed. p. 448.
3. DOMICIL.—*Residence.*—Domicil means more than residence, since a domicil is a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time, and, while a man may have several residences at the same time, he can only have one domicil at a time and may be a resident of a particular locality without having a domicil there. p. 449.
4. DOMICIL.—*Change of Domicil.*—*What Constitutes.*—To constitute a change of domicil there must be residence at another place, and an intention to abandon the old domicil and to acquire a new one. p. 450.

5. **INSANE PERSONS.—Residence.—Acquisition.**—Where one mentally incompetent was removed by relatives from one state to another, and was maintained and cared for in the latter until her death, she acquired a residence there. p. 450.
6. **DOMICIL.—Change of by Incompetent Person.—Intent.—Time of Residence.**—Where one mentally incompetent was removed by relatives from her domicil in one state to another state, she could not, because of her mental incapacity, have formed an intention to change her domicil, and the length of time that she resided in the latter state is of itself unimportant. p. 451.
7. **DOMICIL.—Nature of.**—The term "domicil" is expressive of a relation between person and place, and indicates various degrees of comprehensiveness, as there may be a national domicil, relating to residence in a nation, a quasi-national domicil, relating to residence in a state, and a municipal or domestic domicil, relating to residence in a county, township or municipality. p. 451.
8. **DOMICIL.—Change of.—Incompetent Persons.—Descent and Distribution.**—As a change in municipal domicil involves no laws affecting the descent and distribution of property the courts are more liberal in recognizing the power of a proper representative to change the municipal domicil of an incompetent person or a person *non sui juris* than where the change is of national or quasi-national domicil. p. 451.
9. **DOMICIL.—Quasi-National.—Change of.—Incompetent Person.—Authority of One not Related.**—Where decedent was mentally incompetent, the mother of her next of kin, who was not related to deceased by blood and not her legal guardian, could not on her own motion or at request of decedent affect a change in the latter's domicil from one state to another so as to change the law governing the descent and distribution of property. p. 452.
10. **DOMICIL.—Insane Persons.—Change of Domicil.—Powers of Guardian.**—The guardian of an insane person does not have the power or authority, by virtue of his office, on his own motion to change the legal domicil of his ward from one state to another, so as to affect the distribution or succession of the ward's property on his decease, and especially where the ward, although residing in the jurisdiction of the appointment, is legally domiciled in another state. p. 460.
11. **INSANE PERSONS.—Guardians.—Jurisdiction of Court.—Statutes.**—Primarily, in the absence of a statute, chancery courts have jurisdiction in matters affecting the welfare and the personal property and rights of the insane, but in this state such power is lodged by §3101 *et seq.* Burns 1914, Acts 1895 p. 205, in courts having probate jurisdiction, and where a guardian is

appointed his powers and duties, as prescribed by §§3068, 3107 Burns 1914, §§2521, 2551 R. S. 1881, must be performed under the court's supervision. p. 461.

12. DOMICIL.—*Domicil of Insane Person.—Change of.—Powers of Guardian.—Order of Court.*—An appointed guardian may change the quasi-national domicil of his ward only by proceeding under an order of court. p. 462.
13. JUDGMENT.—*Conclusiveness.—Residence.—Collateral Attack.*—Where a court, with power to act in the general subject-matter involved, determines a jurisdictional question of residence in a proceeding to appoint a guardian, or administrator, the determination of the court for the purposes of executing the involved trust and transacting the business thereof is conclusive against collateral attack. p. 464.
14. INSANE PERSONS.—*Appointment of Guardian.—Statute.—Scope.*—Section 3101 Burns 1914, Acts 1895 p. 205, governing proceedings to determine whether an "inhabitant" of the county is of unsound mind and incapable of managing his own estate, is broad enough to be applicable in a proceedings to determine the mental competency of a person having property and an established business in this state, and living here under circumstances indicating a permanency of residence, although his legal domicil is in fact elsewhere. p. 465.
15. INSANE PERSONS.—*Guardian.—Appointment.—Statute.—Sections 3105, 3106 Burns 1914, §§2549, 2550 R. S. 1881,* relating to the appointment of guardians for insane persons, apply to cases where the insane persons are outside the state or county, but property belonging to them is located therein. p. 465.
16. INSANE PERSONS.—*Adjudication of Insanity in Guardianship Proceedings.—Scope of Inquiry.—Conclusiveness of Judgment.*—An adjudication of unsoundness of mind, in a proceeding under §3101 *et seq.* Burns 1914, Acts 1895 p. 205, for the appointment of a guardian for a person of unsound mind, is not conclusive, as to the sanity of the person involved, in another proceeding in which is questioned his mental capacity in some respect other than the management of his own estate. p. 467.
17. INSANE PERSONS.—*Appointment of Guardian.—Interest of Public.*—A proceeding for the appointment of a guardian for an insane person is based on the theory that the public has an interest in their welfare and in the preservation of their property, and the public rather than the person instituting the proceeding is the real party in interest. p. 467.
18. INSANE PERSONS.—*Adjudication of Insanity in Guardianship Proceeding.—Scope.—Conclusiveness.*—Where one mentally incompetent was removed by a relative from her legal domicil in Kentucky to Indiana, and subsequently, while residing in

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this state, she was adjudged of unsound mind and a guardian was appointed to manage her estate under the provisions of §3101 *et seq.* Burns 1914, Acts 1895 p. 205, the court's determination of the question of her inhabitancy in that proceeding was conclusive only for the purposes thereof, and was not an adjudication of domicile for the purpose of determining what laws govern the descent and distribution of her personal property. p. 468.

19. PLEADING.—*Complaint.*—*Admissions.*—*Sufficiency.*—A complaint which merely alleges that certain relatives of one mentally incompetent removed her from one state to another for the purposes of care and medical attention, does not admit that such relatives changed her domicile. p. 469.

From Vanderburgh Circuit Court; *Edwin Taylor*, Special Judge.

Petition by Edward J. Hayward for the distribution of the estate of Sarah M. Drew, deceased, opposed by Charles W. Hayward, administrator, and others. From the judgment rendered, the petitioner appeals. *Reversed.*

J. W. Blue, Jr., John H. Foster and Walton M. Wheeler, for appellant.

Cunningham & Ortmeier, for appellees.

CALDWELL, J.—Sarah M. Drew died intestate in Vanderburgh county, Indiana, in September, 1913. By appointment of the Vanderburgh Circuit Court, appellee, Charles W. Hayward, is administrator of her estate. Under the provisions of §2902 *et seq.* Burns 1914, Acts 1883 p. 158, appellant filed a petition for a partial distribution of the estate among the heirs. To the petition the appellee, administrator, filed paragraphs of answers numbered third, fourth and seventh, among others unimportant here. The other appellees filed like answers bearing like numbers.

Appellant's demurrer addressed severally to each of said paragraphs of answer filed by the administrator was overruled. There was a like ruling on appellant's demurrer addressed severally to each of said para-

graphs of answer filed by the other appellees. The paragraphs of answer other than the third, fourth and seventh, being withdrawn, judgment was rendered against appellant for failure and refusal to plead over. The errors assigned are based on the rulings on the demurrers.

The further facts disclosed by the petition are to the following effect: The administrator has paid all the debts of the estate, and has in his possession for distribution among the heirs personal assets amounting to about \$15,000. Decedent at the time of her death was seventy-five years of age. Prior to February 1, 1907, she had for many years been legally domiciled at Smithland in the State of Kentucky. February 1, 1907, she had become enfeebled in body and mind, and incapable of providing for her wants, or of determining any question for herself. She had no relatives living in or near Smithland. Thereupon on said day, appellees, who are nephews and nieces, and Virginia Hayward, their mother, having learned of decedent's condition, took charge of her and brought her to Evansville, in Vanderburgh county, for care and medical attention. Appellees shortly thereafter caused proceedings to be brought in the Vanderburgh Circuit Court, pursuant to which a guardian was appointed over the person and estate of decedent, and thereafter until her death appellees and the guardian had full custody and control of decedent's person and estate, and kept and maintained her in Evansville, Vanderburgh county, at the expense of her own estate. Decedent at the time of her removal from Smithland to Evansville and at all times thereafter was incapable of intelligent action in her own behalf, or of forming an intention with reference to any change of residence or domicil, and she did not attempt to and did not change her legal domicil from Smithland, Kentucky, but that place remained her legal resi-

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dence and domicil to the date of her decease. She left as her only heirs at law appellant, a son of one of her deceased brothers, and appellees, Charles W., Walter S., James T., and Ruby Hayward, and Minnie L. Flickner and Adeline Heard, children of another deceased brother. The petition sets out certain statutes of the state of Kentucky to the effect that personal property where governed by the laws of that state descends to nephews and nieces *per stirpes*. Appellant prays a distribution on the basis of one-half to him and one-half to appellees other than the administrator.

The third paragraph of answer is to the effect that, February 1, 1907, there was no person capable of properly caring for decedent except appellant and appellees and Virginia A. Hayward, the mother of the latter; that on said day Virginia A. Hayward, pursuant to the request of decedent, took charge and custody of her person and removed her to the home of the former in Vanderburgh county, and changed and moved her legal residence and domicil from Kentucky to Vanderburgh county, Indiana; that continuously thereafter until her death decedent was an inmate of and was cared for in the home of Virginia A. Hayward, in Vanderburgh county; that all the acts of appellees and of Virginia A. Hayward in the premises were done for the welfare of decedent, and not for the purpose of changing the distribution or descent of her personal estate; that for many years prior to February 1, 1907, and continuously thereafter, decedent's entire personal estate was in Vanderburgh county; that after February 1, 1907, decedent's legal residence and domicil was not changed from Vanderburgh county.

The fourth paragraph of answer is to the effect that for many years prior to 1908 decedent's entire personal estate was in Vanderburgh county, and that throughout that year and continuously thereafter both

her person and her personal estate were in that county. Facts are averred to the effect that in 1908 the Vanderburgh Circuit Court, by a proceeding brought and regularly prosecuted under §3101 *et seq.* Burns 1914, Acts 1895 p. 205, appointed a guardian for the person and estate of decedent as a person of unsound mind. It is averred, also, that thereafter neither the guardian nor decedent removed the legal residence and domicil of the latter from Vanderburgh county. The theory of this paragraph is that by said proceeding the court adjudicated that the legal domicil of decedent was in Vanderburgh county.

The seventh paragraph of answer alleges generally that in a proceeding had in the Vanderburgh Circuit Court, the husband of appellee Minnie L. Flickner was appointed guardian of decedent, and that after his appointment he changed and removed the legal residence and domicil of decedent from Kentucky to Vanderburgh county, Indiana.

In determining the sufficiency of the respective paragraphs of answer, it must be taken as conceded that the actual facts are that on February 1, 1907, decedent was legally domiciled in the State of Kentucky; that on said day, and at all times thereafter, she was, by reason of mental infirmity, incapable of intelligent action in her own behalf, or of determining any question for herself, or of forming any intent with reference to changing or choosing a domicil, and that she did not by any act and intent of her own change her domicil from Kentucky, or choose one in Indiana. These

1. facts must be taken as conceded, because they are so averred in the petition and are not traversed by the answers. By the answers, however, appellees seek to avoid the force and effect of such facts as follows: By the third paragraph, that Virginia A. Hayward, at decedent's request changed the latter's domicil

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from Kentucky to Indiana; by the seventh paragraph, that the guardian, a stranger to decedent's blood, by virtue of his authority as such guardian, changed decedent's domicil as aforesaid; by the fourth paragraph, that the real facts respecting decedent's domicil may not be inquired into, as that question was adjudicated and set at rest by the proceedings wherein a guardian was appointed over decedent's person and estate.

It will be observed that primarily the sole question for our determination is whether under the averred facts decedent at the time of her decease was domiciled in Kentucky or Indiana. The importance of the question consists in the following: If decedent was domiciled in Kentucky, then her personal estate in the hands of the administrator must be distributed under the laws of Kentucky. By such laws, as pleaded, the personal estate of a decedent, as we have said, descends to nephews and nieces, where they are the sole heirs, *per stirpes*, and not *per capita*, and hence if that law governs, appellant is entitled to a full one-half of the personal estate of decedent, subject to distribution. But if decedent at her decease was domiciled in Indiana, then her personal estate subject to distribution must be distributed under the statutes of Indiana. By such statutes, where nephews and nieces are the sole heirs, they take the personal estate *per capita* and not *per stirpes*. It follows that, if the laws of Indiana govern, appellant takes one-seventh of decedent's personal estate in the hands of the administrator for distribution, and appellees, other than the administrator, take six-sevenths thereof. §2993 Burns 1914, §2470 R. S. 1881; *Baker v. Bourne* (1891), 127 Ind. 466, 26 N. E. 1078; *Blake v. Blake* (1882), 85 Ind. 65.

If the court erred in its ruling on the demurrer to each of said paragraphs of answer, this case must be reversed. If any one of such paragraphs is good

2. as against demurrer, it alone is sufficient to support the judgment, and the cause must be affirmed. *Williams v. Wood* (1915), 60 Ind. App. 69, 107 N. E. 683, and cases.

Appellees argue that, in order that a person of unsound mind may establish his domicile, a slight degree of understanding is sufficient, and that the mere fact that he is of unsound mind does not necessarily preclude him from establishing his domicile. Appellees cite such cases as *Culver's Appeal* (1880), 48 Conn. 165; *Mowry v. Latham* (1892), 17 R. I. 480, 23 Atl. 13; *Talbot v. Chamberlain* (1889), 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254. While not doubting the soundness of these decisions, the principle thereby announced is not applicable here. No question of the mental capacity of decedent to change or establish her domicile, or whether she did change it, or attempted to do so, is involved under the pleadings here. The effect of the petition here is that decedent did not have the mental capacity to change her domicile, or to form an intent to that end, and that she did not change her domicile from Kentucky to Indiana. Appellees by their answers do not controvert such allegations in the petition. On the contrary, they impliedly confess that the petition states the truth in such respects, and they seek to avoid the force of such alleged facts by pleading new matter: First, that Virginia A. Hayward changed decedent's domicile from Kentucky to Indiana; secondly, that the guardian after his appointment made such change; and, thirdly, that the Vanderburgh Circuit Court, in a proceeding brought and prosecuted, adjudged that decedent's real domicile was in Indiana. It being directly averred in the third paragraph of answer that Virginia A. Hayward, and in the seventh paragraph that the guardian, changed decedent's domicile, as alleged, these paragraphs present for our determination the single question of the power

or authority of such respective persons in behalf of decedent to abandon her domicil in Kentucky, and to establish for her a domicil of choice in Indiana. The fourth paragraph presents the single question of whether the effect of the proceeding in the Vanderburgh Circuit Court was to adjudicate that decedent was domiciled in this state.

The question of when and under what circumstances the removal of a person from one place to another in search of health will indicate a change of domicil is thoroughly considered in a note to *Pickering v. Winch*, 9 L. R. A. (N. S.) 1159. That question, although urged upon our attention by appellees, is likewise, for reasons above indicated, not pertinent here.

We proceed to determine the sufficiency of the answers, and first the third and seventh paragraphs. On the subject of the relation between residence and

3. domicil, we quote the following from *Long v.*

Ryan (1878), 30 Grat. (Va.) 718: "There is, however, a wide distinction between domicil and residence, recognized by the most approved authorities everywhere. Domicil is defined to be a *residence* at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. To constitute a domicil, two things must concur—first, *residence*; secondly, the intention to remain there. * * * Domicil, therefore, means more than residence. A man may be a resident of a particular locality without having a domicil there. He can have but one domicil at one and the same time, at least for the same purpose, although he may have several residences."

It is conceded in this case that prior to the time when decedent was brought from Smithland, Kentucky, to

Evansville, Indiana, the former place was her
4. domicil. Such concession includes then not only that her residence was in such former place, but also that she intended to remain there permanently or indefinitely. Such place then was her residence in the sense that it was her fixed habitation; a place from which she might be absent temporarily and for temporary purposes, but which she regarded as her permanent home to be returned to when the purposes of her temporary absence had been accomplished. Eventually she came to Indiana. It is urged that such transfer of her bodily presence ripened into the acquisition of a new domicil, a domicil of choice in the latter place. "To constitute a change of domicil three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicil; and (3) an intention of acquiring a new one, or, as some writers express it, there must be an *animus non revertendi* and an *animus manendi*, or *animus et factum*. (Authorities.) The *factum* is the transfer of the bodily presence and the *animus* is the intention of residing permanently, or for an indefinite period." *Pickering v. Winch, supra*. Dicey's Rule 7 respecting the domicil of natural persons is thus expressed: "Rule 7.—Every independent person can acquire a domicil of choice, by the combination of residence (*factum*) and the intention of permanent or indefinite residence (*animus manendi*), but not otherwise." Dicey, *Conflict of Laws* (2d ed.) 108.

There is no doubt that decedent acquired a residence in Indiana, and that she retained such residence until her death, using the term "residence" as signi-
5. fying bodily presence merely. In the process of acquiring a domicil of choice, however, residence or length of residence alone, and in the absence of the necessary intent, is, as we have indicated, without effect.

Dupuy v. Wurtz (1873), 53 N. Y. 556; *Pickering v. Winch*, *supra*.

In the case at bar, as presented to us, the fact that decedent remained at Evansville a long time, rather than a short time, is of itself unimportant, as

6. here we are dealing with the questions of power and of adjudication as indicated. It cannot be said here that decedent left Kentucky with the intent of abandoning her domicil, or that she came to Indiana with the intent of acquiring a new domicil, for the reason, as we have indicated, that it is impliedly conceded here that she did not have the mental capacity to form such an intent. We are thus brought to a consideration of the question whether either Virginia A. Hayward or the guardian had the power to form such intent for her as an incompetent person. The term "domicil"

7. is expressive of a relation between person and place. As used, it indicates various degrees of comprehensiveness. Thus, such term may relate to permanency of residence in a nation, or in a subdivision exercising quasi-sovereign powers, with its own system of laws, as a state of the federal Union; or a smaller subdivision as a county, township, or municipality. Hence there may be "national domicil," relating to residence in a nation; "quasi-national domicil," relating to residence in a state; or "municipal domicil," sometimes referred to as "domestic domicil," relating to residence in a county, township or municipality. The first two are sometimes included in the term "national domicil." Jacobs, *Law of Domicil* §77.

A change of domicil involving a state of this country and a foreign country or two states of the federal Union involves also a change in the laws relating

8. to the succession to, or distribution of, the personal property of a decedent. In this respect a change in national or quasi-national domicil differs from

a change in mere municipal domicil, or from one part of a state to another. For such reasons, the courts are more liberal in recognizing the power of a proper representative person to form the intent and perform the act requisite in changing the domicil of an incompetent person or a person *non sui juris*, where the change relates to municipal rather than to national or quasi-national domicil. It is urged that the national or quasi-national domicil of decedent was changed, and, if so, as we have said, certain laws of this state govern the distribution of personal property and are substituted for laws of Kentucky of a like nature.

We direct our attention now specifically to the third paragraph of answer. It discloses that appellant and appellees were the next of kin of decedent when

9. she was brought to Indiana; that Virginia A.

Hayward was not related to decedent by ties of blood, but that she was the widow of decedent's brother; that Virginia A. Hayward, rather than such next of kin, formed the intent and performed the act necessary in order to a change of decedent's domicil from one state to another. We know of no text-book or decided case that may be pointed to as supporting a contention that under the facts of this case Virginia A. Hayward had the power or authority on her own motion or at the request of decedent, conceded to have been incompetent, to affect a change in the quasi-national domicil of the latter. We are therefore required to hold the third paragraph of answer to be insufficient, and that the court erred in overruling the demurrer to it. That our conclusion is sound will become apparent, as we review the authorities. In support of the third paragraph, appellees, reasoning by analogy, resort to the case of infants and state the general proposition that after the death of the parents the next of kin of an infant having its custody may establish its domicil, and

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may change such domicile from one state to another. It is a sufficient answer to such proposition that the third paragraph of answer alleges that Virginia A. Hayward had the custody of decedent, and that she was not the next of kin. However, we proceed to review the following authorities, cited by appellees: *Churchill v. Jackson* (1909), 132 Ga. 666, 64 S. E. 691, Ann. Cas. 1913E 1203, 49 L. R. A. (N. S.) 875; *Warren v. Hofer* (1859), 13 Ind. 167; *Hiestand v. Kuns* (1847), 8 Blackf. 345, 46 Am. Dec. 481; *Lamar v. Micou* (1884), 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751; *Lamar v. Micou* (1884), 114 U. S. 218, 5 Sup. Ct. 857, 29 L. Ed. 94; *In re Benton* (1894), 92 Iowa 202, 60 N. W. 614, 54 Am. St. 546.

The Churchill case involved no question of national or quasi-national domicile. The contest there was respecting which of two county courts in the state of Georgia had jurisdiction to appoint a guardian for an infant. It was held that where the parents of an infant are dead, the grandparents having its custody may as the next of kin change its domicile from the county to another, and especially where such custody has been awarded by the decree of a proper court. In *Hayslip v. Gillis* (1905), 123 Ga. 263, 51 S. E. 326, the court denied the existence of such a power in a person who is a stranger to the blood of the child. The Warren case presented the question of the change of the quasi-national domicile of a child, but it does not sustain appellee's contention. To the extent that it may be considered in point, its spirit is the other way. The Hiestand case involved a question whether the domicile of a child had been changed from Ohio to Indiana, and also the authority of an uncle by marriage. The matter of domicile is disposed of on the ground that the child, being in Indiana, but legally domiciled in Ohio, arrived at an age when by the law of the latter state she was authorized

to choose her own domicil, and that she chose the former state. The Lamar case was before the federal Supreme Court twice, first, on the original hearing as reported in 112 U. S. 452. We quote the following as indicating the doctrine announced in that case in the original hearing: "The father, and after his death the widowed mother, being the natural guardian, and the person from whom the ward derives his domicil, may change that domicil. But the ward does not derive a domicil from any other than a natural guardian. A testamentary guardian nominated by the father may have the same control of the ward's domicil that the father had. *Wood v. Wood*, 5 Paige, 596, 605. And any guardian, appointed in the state of the domicil of the ward, has been generally held to have the power of changing the ward's domicil from one county to another within the same state and under the same law. (Authorities.) But it is very doubtful, to say the least, whether even a guardian appointed in the state of the domicil of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicil beyond the limits of the state in which the guardian is appointed and to which his legal authority is confined. (Authorities.) It is quite clear that a guardian appointed in a state in which the ward is temporarily residing cannot change the ward's permanent domicil from one state to another." It is evident that the language last quoted has a bearing also on the seventh paragraph of answer, and especially the concluding part of the quotation, since the seventh paragraph of answer proceeds on the theory that decedent's legal domicil was in the State of Kentucky when the guardian was appointed, although she was residing in Indiana, and that under such circumstances the guardian undertook to change her domicil to the latter state. The Lamar case when it was up for rehearing as re-

ported in 114 U. S. 218 contains some language supporting the proposition that a natural guardian, not a parent, may change the quasi-national domicil of an infant. In that case, however, no question of the succession of property was directly involved. The Benton case, also, to some extent sustains appellees' proposition in that it also holds that a natural guardian other than a parent may change the quasi-national domicil of an infant so as to vest in a court of the new domicil jurisdiction to appoint a guardian for the infant. It is expressly said, however, in the opinion that, while the next of kin may not change the domicil of an infant so as to affect its rights of succession or of property, yet if the change is made in good faith a new domicil may be acquired which will give a probate court jurisdiction to appoint a guardian at law for it. These cases, in any event, do not support appellees' contention under the facts here, since Virginia A. Hayward was in no sense a natural guardian of decedent. It will be observed from some of the cases above discussed, as well as other cases and text-books to which we shall refer, that, in determining questions of the power of a guardian to affect a change in the domicil of an incompetent or a person *non sui juris*, importance is attached not only to the question whether the change affects the national or quasi-national domicil rather than merely the municipal domicil, but also to the question of the nature of the guardianship and the source of the guardian's power, as whether he is a natural guardian, as a parent or next of kin, a testamentary guardian, as one named in a will, or a guardian appointed in a court proceeding brought to that end. In support of the proposition that the guardian of an insane person may establish and change the domicil of his ward, appellees cite *Brookover v. Kase* (1907), 41 Ind. App. 102, 83 N. E. 524; *Anderson v. Anderson* (1869), 42 Vt. 350, 1 Am.

Rep. 334; *Matter of Robitaille* (1912), 78 Misc. Rep. 108, 138 N. Y. Supp. 391. In the Brookover and Anderson cases, respectively, the court was considering a change in municipal rather than quasi-national domicile, and what is said in each of these cases must be considered accordingly. The Robitaille case presented the question whether the courts of a province of Canada, rather than the courts of New York, had jurisdiction primarily to direct the administration of the estate of Robitaille under his last will and testament. The question of jurisdiction depended on whether the guardian of Robitaille, an insane person, had the power to transfer the ward's domicile from New York to Canada. The court held that under the peculiar facts and for the purposes of that case such power existed. Briefly, such facts were that Robitaille had originally been domiciled in Canada. He had moved to New York, however, engaged in business, and established his domicile there. Subsequently he sold his business, and announced his intention to return to Canada where his people lived. Before he executed his intention, he suddenly became insane, and a guardian was appointed. The guardian removed him to Canada, where he died testate. An analysis of the opinion discloses that the fact that the testator had formed such intent, together with the further fact that no question of succession to his property was involved, controlled the decision. The court say that the fixed intent of the testator to establish his domicile in Canada was a very controlling circumstance, and also that, if it should be made to appear subsequently that any rights of a citizen of this country to the estate of testator were adversely affected by the decision, relief might be had on application for reargument.

Appellees state also a proposition to the affect that the guardian of an infant has authority by virtue of his

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position to establish and change the domicil of his ward. In addition to cases which we have already discussed, appellees cite the following: *Kirkland v. Whately* (1862), 86 Mass. 462; *Wilkins' Guardian* (1892), 146 Pa. 585, 23 Atl. 325; *Wheeler v. Hollis* (1857), 19 Tex. 522, 70 Am. Dec. 363; *In re Kiernan* (1902), 77 N. Y. Supp. 924. Appellees seek to apply the doctrine of such cases by analogy to the question here. In the Kirtland case, the question was respecting the power of a guardian to change the municipal domicil of his ward. The Wilkins case holds that an infant may have a residence for the purpose of nurture, education, etc., distinct from its legal domicil controlling the descent and distribution of its property, and that it is within the power of the guardian to change the former. In the Wheeler case, the stepfather was guardian of the infant involved. The decision is to an extent controlled by the fact that the mother of the child considered by the court as in the nature of a natural guardian was a party to the change of domicil. In the Kiernan case the guardian was both a testamentary and a natural guardian, and, moreover, the court citing *White v. Howard* (1868), 52 Barb. 294, grounds its opinion on the fact that the father of the child by his last will and testament impliedly directed that the child's domicil be changed from New York to Connecticut.

However, a study of the decided cases is convincing that courts and law-writers are not in entire harmony with respect to the authority of an appointed guardian on his own motion to change the national or quasi-national domicil of his insane ward. Jacobs deduces from the authorities the following: "With respect to the power of the guardian to change the national or quasi-national domicil of his insane ward, much that has already been said with respect to the guardianship of minors is applicable. It does not appear ever to have

been held, either in this country or in England, that he has such power. Phillimore thinks he has, and rests his opinion upon several Scotch cases, which, however, do not seem to bear him out. Westlake and Dicey maintain the opposite view, and upon general principles there appears no good reason why the guardian should be held to possess such power." Jacobs, Law of Domicil §265.

From an analysis of a large number of decisions, Jacobs states the following as the general result of the American cases respecting the power of the guardian of an infant to change its domicil: "1. That a guardian has the power to change the municipal domicil of his ward. (2) That the domicil of the ward is not necessarily that of his guardian. (3) That the natural guardian certainly, and the testamentary guardian probably, has the power to change the national or quasi-national domicil of his ward, unless expressly prohibited by a competent court. (4) That the power of an appointed guardian to change the national or quasi-national domicil of his ward is, to say the least, very doubtful." Jacobs, Law of Domicil §260.

Dicey recognizes that there are two views of the subject under consideration: First, that an insane person retains the domicil which he possessed when he began to be legally treated as insane; secondly, that the guardian or committee of such an insane person may change his domicil at will, if actuated by proper motives. He states that the first view is sound, and that it is favored by the English cases; that the second view is favored by some American cases, but that it is open to objection in that it ascribes to a guardian greater authority than a father has as a natural guardian; that the latter may not establish for his child a domicil separate from his own domicil. He states, from an examination of the cases, that the second view arises from a confusion

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between the power to change the residence of an insane ward, and the right to change his domicil. Dicey, *Conflict of Laws* (2d ed.) 149.

Wharton says in substance that whether the domicil acquired when sane can be divested by a guardian of the ward after the latter has become insane may be doubted; that the proper course for the guardian to pursue in order to change the domicil is to obtain an order of court to that effect. He quotes from Westlake that in France the rule has been modified to the effect that a guardian there is now recognized to have such power, and that the basis of the modification is the fact that laws and customs have become uniform throughout the French Republic, and that the reasons for the modification are not applicable to the British Empire with its many systems of law. Wharton then says that Westlake's reasons apply equally to the United States, and that the better view is that a person under guardianship for lunacy is entitled to the same rights as to domicil as an infant. Wharton, *Conflict of Laws* (3d ed.) §52. In the same work, the author says that, as the law of succession varies so much in passing from state to state, the power of arbitrarily changing succession by changing the minor's domicil is one which no guardian ought to possess. §42. And that it is clear that a guardian appointed in a state in which the ward is not domiciled, but is temporarily residing, cannot change the latter's permanent domicil. §42a.

In addition to the cases already discussed, the following are to the effect that an appointed guardian of an insane person by virtue of his office may not on his own motion change the domicil of his ward from one state to another, so as to change or affect the succession of his property on his decease. *Daniel v. Hill* (1875), 52 Ala. 430; *Talbot v. Chamberlain*, *supra*; *Mears v. Sinclair* (1865), 1 W. Va. 185; *Ex Parte Bart-*

lett (1857), 4 Bradf. Sur. (N. Y.) 221; *Sumrall's Committee v. Commonwealth* (1915), 162 Ky. 658, 172 S. W. 1057.

The seventh paragraph of answer, as we have said, proceeds on the theory that, at the time of the appointment of the guardian, decedent was domiciled in

10. Kentucky, and that the guardian after his appointment changed decedent's domicil from Kentucky to Indiana. Under such circumstances, the laws of the former state are entitled at least to respectful consideration, as the change of domicil, if valid, affected the status of a person legally domiciled in that state. In the case last cited, the Court of Appeals of Kentucky said: "The brief of appellant's counsel seems to take no account whatever of the distinction between the within-state or municipal domicil and the out-of-state, national or quasi-national domicil, or to realize the fact that in this jurisdiction the right of the committee to change the domicil of the ward by removing it to another state has never been recognized." In support of its conclusion the court quotes with approval from *Minor's Conflict of Laws*, pages 108 and 109, as follows: "The question remains, what is the locality of the lunatic's domicil when he is himself too insane to choose one? Shall the guardian or committee have power to change it, or must it remain unalterably where it was when the disability was first incurred? This case is closely analogous to that of the guardian's power to change his infant ward's domicil, already discussed. As to the lunatic's municipal domicil, it seems that the guardian has the power, but not so with respect to his national or quasi-national domicil. His latter domicil will remain unchanged regardless of the place of his actual residence. He will retain the domicil he possessed before he became insane, upon the principle that

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a domicil once acquired is retained until another is gained.' ”

We conclude that, while the question is not free from difficulty, the guardian of an insane person does not have the power or authority, by virtue of his office, on his motion to change the legal domicil of his ward from one state to another, so as to affect the distribution or succession of the ward's property on his decease, and especially where the ward, although residing in the jurisdiction of the appointment, is legally domiciled in another state. It follows that the court erred in overruling the demurrer to the seventh paragraph of answer.

A consideration of the nature of a guardianship over the person and property of the insane confirms us in our conclusion. Primarily, in the absence of a

11. statute, courts exercising chancery powers, *ex necessitate*, are clothed with power in matters that affect the welfare and the personal and property rights of the insane, and to that end they appoint guardians who become administering agencies of the court, and subject to its supervision. 22 Cyc 1120; *In re Sall* (1910), 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. 885. In this state such power is lodged in courts having probate jurisdiction. §3101 Burns 1914, *supra*. Where, pursuant to a proper proceeding, such a guardian is appointed, his powers and duties outlined and prescribed by statute (§§3068, 3107 Burns 1914, §§2521, 2551 R. S. 1881) must be exercised and performed under the supervision of the court. Doubtless, situations may arise where it is apparent that the best interests of the ward require that his legal domicil be changed from one state to another. Such a change of domicil, however, involves very important consequences. Thus, thereby one system of laws as affecting the person and personal estate of the subject of

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the change of domicil becomes substituted for another system. The nature of a guardianship, as we

12. have said, is such that in the important matters of his trust, the guardian is governed and controlled by the supervisory powers of the court. We believe that doctrine to be soundest which is to the effect that an appointed guardian may change the quasi-national domicil of his ward only by proceeding under an order of court. The guardian here proceeded on his own motion. Wharton, Conflict of Laws §§42, 52; *State, ex rel. v. Lawrence* (1902), 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931; *Wilkins' Guardian, supra*; *Matter of Robitaille, supra*, 397; *Hill v. Horton* (1886), 4 Dem. Sur. (N. Y.) 88; 9 R. C. L. 551.

We proceed to consider the fourth paragraph of answer: Section 3101 Burns 1914, *supra*, is in part as follows: "Whenever any person shall by a statement in writing represent to the court having probate jurisdiction, in any county, that any inhabitant of such county is a person of unsound mind and incapable of managing his own estate, such court shall cause such person to be produced in court and shall cause an issue to be made by the clerk of such court denying the facts set forth in such statement;" and trial had as provided by the section. Section 3102 Burns 1914, Acts 1895 p. 205, provides in substance that, if the issue should be determined in the affirmative, the court shall appoint a guardian for such person who shall have the custody of his person and the management of his estate.

The fourth paragraph of answer alleges facts to the effect that in 1908 Virginia A. Hayward filed in the Vanderburgh Circuit Court the statement in writing contemplated by §3101, *supra*, and that such proceedings were thereafter had as that the court appointed the husband of appellee Flickner guardian of the person and estate of Sarah M. Drew; that thereafter

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neither the guardian nor decedent changed or removed the latter's legal domicile from Vanderburgh county, Indiana.

It is appellees' contention that by such proceeding the court adjudged not only that decedent was a person of unsound mind, incapable of managing her own estate, but also that her domicile was in Vanderburgh county, Indiana, and that such adjudication fixed the status of decedent as domiciled in Indiana, for all purposes, and conclusive against collateral attack. Appellees cite such cases as *Soules v. Robinson* (1901), 158 Ind. 97, 62 N. E. 999; *Cunningham v. Tuley* (1899), 154 Ind. 270, 56 N. E. 27; *Williams v. Dougherty* (1906), 39 Ind. App. 9, 78 N. E. 1067; *Dequindre v. Williams* (1869), 31 Ind. 444.

The first three cases cited in effect hold that where a court of general jurisdiction of a certain county entertains a proceeding to appoint a guardian of an infant or of a person of unsound mind, or an administrator of the estate of a decedent, or to probate the last will of a testator, on the representation that the person involved is or was a resident or inhabitant of such county, and action is taken by the court accordingly, the judgment is conclusive as against attack based on a like proceeding subsequently had in a proper court of some other county on the assumption or representation that such involved person is or was a resident or inhabitant of such county. In the *Dequindre* case, by proceedings had in the proper court of Knox county, a guardian was appointed for certain infants as residents of such county. Subsequently, by proceedings had under the statute, the guardian sold and conveyed certain lands owned by his wards. Later, the wards having arrived at full age, they or their representatives brought suit to recover the lands asserting that at the time of the appointing of the guardian they were legally

domiciled in Illinois, and therefore that the court did not have jurisdiction to appoint the guardian, and that as a consequence, not only the appointing of the guardian, but also his act in selling the land, was void and not binding on them. It is held that it was within the province of the Knox county court to determine the jurisdictional fact of the residence of the infants, and that, having done so, its action in the premises for purposes of the proceeding was conclusive against collateral attack.

These cases are authorities that where a court with power to act in the general subject-matter involved determines a jurisdictional question of residence

13. in a proceeding to appoint a guardian, or an administrator, or the like, the determination of the court for the purposes of executing the involved trust and transacting the business thereof is conclusive against collateral attack. They are not authorities in support of the proposition that such determination is effective for purposes totally disconnected from the matter in hand. We are not concerned here with the question whether the Vanderburgh Circuit Court, by its decree appointing the guardian of the person and estate of Sarah M. Drew, thereby for purposes of the created trust determined conclusively against collateral attack that she was at the time an inhabitant of Vanderburgh county. No one disputes that fact. No one is attacking that trust or its execution. Its validity is impliedly conceded by the parties to this proceeding. The question here is whether, for purposes of succession to her personal property, the court in that proceeding adjudicated that she was legally domiciled in Indiana, rather than in Kentucky.

We do not find it necessary in this case to determine whether the word "inhabitant," as used in §3101, *supra*,

includes only one legally domiciled in this state,

14. or whether it is more comprehensive in meaning.

However, a situation is possible wherein a person residing in this state has property and an established business here, surrounded by the indicia of permanency of residence, his legal domicil being in fact elsewhere. It is our judgment that such section is broad enough to include such a case. There are other sections of the statute, *supra*, as §3105 and §3106, (§§2549, 2550 R. S. 1881) by virtue of which

15. courts are given jurisdiction to appoint guardians of insane persons, who when appointed are authorized to take charge of the property of such person within the jurisdiction of the court. Such sections apparently apply to insane persons who reside beyond the state, or beyond the county in which the probate court authorized to act exercises jurisdiction, in the sense that the bodily presence of such persons is beyond the limits of the state or county, there being property of the incompetent within such county. The purpose of a guardianship created under such sections is the preservation of such property. A proceeding under §3101, *supra*, is prosecuted in fact by the public, and for the benefit of the insane person and his property. We do not believe that if an action were instituted under said section, and on a hearing it developed that the person involved was not technically domiciled in this state, the court would then have recourse to one of such subsequent sections, the proceeding resulting in a decree for the care of the property, and the insane person being permitted to go hence unattended. Such a presumption would be out of harmony with the entire theory under which such proceedings are prosecuted. On this subject, the Supreme Court of Iowa, in constru-

ing a statute very similar to §3101, *supra*, and containing a provision that a guardian may be appointed when a petition is presented that any inhabitant of the county is of unsound mind, etc., has the following to say: "We are unable to agree with counsel that jurisdiction in guardianship cases is made to depend upon a strict construction of the word 'inhabitant,' as found in the statute. We think it was meant to provide a means whereby the property of persons of unsound mind, living or being at the time within this state, might be preserved and cared for. No other purpose or intent is to be gathered from the statute. Now, it may frequently happen that a person having his legal residence in a sister state has for a more or less extended period before becoming mentally deranged, actually lived in this state, and that much or possibly all his effects are in this state. It is not within reason to say that in his interest and for his benefit the courts are powerless to provide for the care and protection of his property. And it would be absurd to say that if, upon proceedings being brought for the appointment of a guardian, proof of the legal domicil or residence shall not be accessible, the proceedings must abate, and the property of the unfortunate be cast out, to find its way into such hands as may be in waiting to seize and make disposition of it. So too, it must be taken into account that very important property rights may depend upon the fact of legal residence. It is not difficult to conceive that rights of homestead, of qualified life estate, and perhaps of conditional gifts and bequests, etc., may be made to thus depend. To say that it was intended that the appointment of a guardian should have effect to thus deprive the helpless subject of such proceedings of his property rights would be to announce a rule at once intolerable and unjust. On

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the contrary, as we think, the object of the statute was to benefit, not to despoil, the unfortunate." *Brown v. Lambe* (1903), 119 Iowa 404, 93 N. W. 486.

In any event, while inhabitancy within the meaning of the statute must first be established as a jurisdictional fact, the primary object of the proceed-

16. ing is not to ascertain whether the person involved is domiciled in this state, but rather to establish his mental capacity as measured by his ability to manage his own estate. *Hughes v. Jones* (1889), 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 632, 15 Am. St. 386. Where in such a proceeding there is an adjudication of unsoundness of mind, such adjudication is not conclusive in its relation to some other proceeding in which is brought in question the mental capacity of the person involved as manifested in some field of activity other than the management of his own estate. *Taylor v. Taylor* (1910), 174 Ind. 670, 93 N. E. 9; *Harrison v. Bishop* (1892), 131 Ind. 161, 30 N. E. 1069, 31 Am. St. 422; *Pepper v. Martin* (1910), 175 Ind. 580, 92 N. E. 777; *Blough v. Parry* (1896), 144 Ind. 463, 493, 40 N. E. 70, 43 N. E. 560.

As we have indicated, a proceeding for the appointment of a guardian for an insane person has its foundation in the theory that the public has an interest

17. in the welfare of such unfortunates and in the preservation of their property, and that such interest is promoted by the public through an authorized representative taking charge of any such person and his property and preserving the latter from waste, it being ascertained first that such person is unable to care for either himself or his property. It follows that, while the law is set in motion by information brought to the court by some third person, the public, as in criminal prosecutions, rather than the person furnishing such

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information, is the real party in interest. We conclude that, assuming that the word "inhabitant," as 18. used in the statute, is so restricted in meaning as to include only persons legally domiciled in this state, the court in the guardianship proceeding determined the question of inhabitancy only for purposes of that proceeding. It is our judgment that in that proceeding there was no adjudication binding on appellant in the case at bar that Sarah M. Drew was domiciled in Indiana, in the sense that the laws of this state determine the question of the distribution of her personal property, and as stated in *Brown v. Lambe, supra*, that the parties here are free to make such proof on the subject of the domicil of decedent at the time of her decease as may be within their power. As having a bearing, see the following: *Brown v. Lambe, supra*; *Hughes v. Jones, supra*; *Mutual, etc., Ins. Co. v. Tisdale* (1875), 91 U. S. 238, 23 L. Ed. 314; *Scott v. McNeal* (1893), 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; *Wood v. Davis* (1812), 7 Cranch 271, 3 L. Ed. 339; *Oborn v. State* (1910), 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966, 974; *American Woolen Co. v. Leshner* (1915), 267 Ill. 11, 107 N. E. 882; *Way v. Way* (1872), 64 Ill. 406; 1 Van Fleet, Former Adjudications §520; *Luke v. Hill* (1911), 137 Ga. 159, 73 S. E. 345, 38 L. R. A. (N. S.) 359, and note; *Bolton v. Schriever* (1892), 18 L. R. A. 242; *Baker v. Baker, etc., Co.* (1915), 162 Ky. 683, 173 S. W. 109; *Brigham v. Fayerweather* (1886), 140 Mass. 411, 5 N. E. 265; *Dallinger v. Richardson* (1900), 176 Mass. 77, 57 N. E. 224.

The judgment is reversed, with instructions to the court to sustain the demurrer to the third, fourth, and seventh paragraphs of answer, and with permission to plead over if desired.

ON PETITION FOR REHEARING.

CALDWELL, J.—Appellees insist that the complaint or petition does not state a cause of action, and that as a consequence this court should have carried the

19. demurrers filed to the answers back to the complaint and sustained them to the latter. Appellees' contention is based on the assumption that the complaint discloses that appellees and their mother, Virginia A. Hayward, changed Sarah M. Drew's legal domicil from Kentucky to Indiana. In indulging such assumption, appellees do not distinguish between "residence" and "legal domicil." The complaint goes no further than to allege that for purposes of care and medical attention the persons named removed Sarah M. Drew—that is, transferred her bodily presence—from the one state to the other. In fact, the complaint expressly avers that for fifty years prior to such removal, Sarah M. Drew's residence and legal domicil were at Smithland, Kentucky, and "that said point remained her legal residence and domicil up until the date of her death." Under the facts averred, it was very commendable in appellees to take charge of Sarah M. Drew and look after her physical needs in her last days, and was eminently proper for them to remove her person to their own homes in order that they might more conveniently do so. A change in the legal domicil of Sarah M. Drew, however, was not necessary to that end. In the original opinion, we held that no paragraph of answer presented the question of the power of the next of kin of an incompetent person to change his legal domicil from one state to another, such change involving the descent of or succession to his personal property on his decease. Incidentally, however, we discussed that question. The evil results that might flow from the recognition of such a power unrestricted in the next of kin of such a

person, and especially in but a part of the relatives composing the nearest degree of consanguinity, are illustrated by the possibilities here. It so happens that if Sarah M. Drew were legally domiciled in Indiana, rather than in Kentucky, at the time of her decease, appellees profit thereby. If she were legally domiciled in Kentucky, rather than in Indiana, appellant profits thereby. Appellant and appellees stood in the same degree of consanguinity to Sarah M. Drew. If the latter, by reason of their relationship, had the power to change her domicil from Kentucky to Indiana, then the latter, by reason of a like relationship, had the power to prevent such change, or to rechange such domicil back to Kentucky. It thus appears that the recognition of such an unrestricted power might involve a constant contest among the relatives of an aged incompetent for the possession of his person, and to the destruction of the peace and comfort of his last days. It is proper to say, however, that the record here reveals no hint of suspicion that appellees, or their mother, or the guardian, were moved by any other than the best and purest motives in any action taken by them respecting Sarah M. Drew in the days of her alleged incompetency.

It is alleged, also, that we misinterpreted *Hiestand v. Kuns* (1847), 8 Blackf. 345, 46 Am. Dec. 481. The decision in that case is indicated by the following contained in the opinion. "The child takes the domicil of the parent, and cannot, as a general rule, while under age, *proprio marte*, change that domicil; nor is the power of the guardian to effect such change unlimited. * * * It may, therefore, well be doubted whether any change had taken place in Rosanna's domicil prior to her becoming eighteen years old. If not, then at that age she was still under the law of Ohio, and by it became at that time of age, and capable of choosing a domicil for herself. We are satisfied from the evidence

upon the record that she did then make such choice; that she did then determine to make Indiana her future permanent abode; and there thus being a concurrence of actual 'residence and intention of making it the home of the party,' the domicil here, according to Story, was complete."

The original opinion is not open to a construction that appellees are foreclosed by the fact that their answers are insufficient. An issue may be formed, if desired, whether Sarah M. Drew was mentally competent to change her own domicil, and whether she did so.

Petition for a rehearing overruled.

NOTE.—Reported in 115 N. E. 966, 116 N. E. 746. Domicil: terms synonymous, Ann. Cas. 1915C 783, 14 Cyc 834, 835; incidents of, 48 Am. St. 711. See under (4) 14 Cyc 838; (5, 6, 8-12) 14 Cyc 845, 848, 849; (7) 14 Cyc 833.

STATE OF INDIANA, EX REL. SMITH v. SMITH ET AL.

[No. 9,386. Filed October 30, 1917.]

1. BAIL.—*Release of Sureties.—Surrender of Principal.*—The sureties on a forfeited recognizance bond given in a bastardy proceeding may, as in other actions where the rules of civil practice prevail, surrender their principal before final judgment on the bond and be released from further liability without being required to pay costs. p. 473.
2. BAIL.—*Criminal Cases.—Forfeited Recognizance.—Release of Sureties.—Payment of Costs.—Statute.*—In strictly criminal cases, §2027 Burns 1914, Acts 1905 p. 619, requires the surety on a forfeited recognizance to pay, on the surrender of his principal before final judgment on the bond, such costs as the court may adjudge before he may be released from liability. p. 473.
3. BASTARDS.—*Forfeited Recognizance.—Release of Sureties.*—Though it is not a condition precedent to the discharge of the sureties on a forfeited recognizance bond given in a bastardy proceeding that on the surrender of their principal before final judgment on the bond, that such sureties were ready and willing to pay the costs and to confess judgment therefor on the surrender of their principal before final judgment on such a

recognizance, shows a substantial compliance with §2027 Burns 1914, Acts 1905 p. 619, requiring sureties on forfeited recognizance in a criminal case to pay the costs on the surrender of their principal before they may be discharged from liability. p. 474.

From Madison Circuit Court; *Willis S. Ellis*, Special Judge.

Action by the State of Indiana, on the relation of Anna Smith, against Earl Smith and others. From a judgment for defendants, the relator appeals. *Affirmed.*

Albert H. Vestal, for appellant.

P. B. O'Neill and *Frederick Van Nuys*, for appellees.

IBACH, P. J.—At a preliminary hearing before a justice of the peace in Madison county appellee Earl Smith was adjudged to be the father of a bastard child. He, together with the other appellees, thereupon furnished the required statutory bond in such cases for \$500 for his appearance at the next succeeding term of the circuit court. Failing to appear on the day of the trial, he was defaulted and judgment rendered against him on default in the sum of \$1,000, and that he stand committed until the same was paid or replevied.

Shortly thereafter this suit was brought on the recognizance bail. The additional sixth paragraph of answer alleged facts showing that the said Earl Smith, before final judgment on the said forfeited recognizance and on April 12, 1915, was found by the sureties and surrendered to the sheriff of Madison county and to the judge of the circuit court thereof, for the purpose of said defendant Smith complying with the order of commitment of said court, and he is now and has been continuously since April 26, 1915, confined in the jail of said county pursuant to said order of commitment. That his codefendants stand ready and willing to pay the costs of this action just as soon as they are determined, and offer to confess judgment for costs.

The bond involved in this suit contains the usual conditions to be found in other bonds—that the defendant would appear at the next term of the circuit court following the hearing before the justice of the peace and answer the complaint, not depart without leave, and abide the orders of the court, on failing therein that he would pay such sums of money and to such persons as might be adjudged by the court.

The defendant failing to appear at the next term of the circuit court, being defaulted and failing to pay or replevy the judgment which was rendered against him, a breach of the bond occurred and a right of action thereon arose. This being true, appellant assumes the position that appellees, sureties on the recognizance bond, can only be discharged from liability by paying the judgment or replevying the same, but no authorities are cited in the brief to support such position.

Here the pleading discloses a surrender of the defendant before judgment in the suit on the bond and, the authorities seem to be uniform in this state,

1. that in civil as well as in criminal cases the surety on such bonds may surrender his principal before final judgment on the bond. In
2. strictly criminal cases, the statute (§2027 Burns 1914, Acts 1905 p. 619) requires the payment of such costs as the court may adjudge to be paid
 1. by them before the sureties can be discharged from liability upon such bond. But in civil or quasi-civil suits where the rules of civil practice prevail, the sureties upon similar recognizance bonds may be released from further liability without being required to pay costs. §915 Burns 1914, §870 R. S. 1881; §2027 Burns 1914, *supra*; *Turner v. Wilson* (1875), 49 Ind. 581; *Clark v. State, ex rel.* (1890), 125 Ind. 1, 24 N. E. 744; *State, ex rel. v. Fletcher* (1891), 1 Ind. App. 581, 584, 585, 28 N. E. 111.

In the case last cited this court said: "It seems exceedingly clear, under these statutes, that the purpose to be accomplished by the bond was to have the defendant present in court at the trial and abide the order and judgment of the court; and, when judgment is pronounced, that the court might commit him to jail under Section 992, R. S. 1881, upon failure to pay or replevy the judgment against him. * * * There certainly is no distinguishable difference in the principle that a surety on a recognizance bond, in a bastardy case, can surrender his principal and be released from liability thereon, and when the principal was present in court and abides the order and judgment of the court."

Likewise under the facts disclosed by the answer now under consideration the result is the same as if the defendant had made no default, for the purposes of the bond have been fully accomplished and the relatrix has suffered no injury, but, on the contrary, she has received every right given her by statute.

Appellant further contends that the answer does not aver that the costs have been paid and that payment is a condition precedent to a discharge of the recognizance upon surrender of the principal. As heretofore stated, payment of costs is only required in criminal cases, but in any event we think the answer sufficient in this respect. Upon this question it contains the following averment: "That (appellees) stand ready and willing to pay the costs of this action just as soon as they are determined and offer to confess judgment for costs." This is a substantial compliance with the criminal statute (§2027, *supra*), and the answer was sufficient against appellant's objection.

As tending to support our conclusion, see *Doyle v. Ringo* (1913), 180 Ind. 348, 351, 102 N. E. 18, and cases cited; *Bowen v. Gerhold* (1903), 32 Ind. App. 614, 616, 617, 70 N. E. 546, 102 Am. St. 257. The court

did not err in overruling the demurrer to the sixth paragraph of answer.

No available error being shown the judgment is affirmed.

Hottel, C. J., and Dausman, J., dissent.

NOTE.—Reported in 117 N. E. 553. See under (1) 6 C. J. 1044, 1053.

BOREN v. SCHWEITZER.

[No. 9,484. Filed October 31, 1917.]

1. **CONTRACTS.—Parol Evidence.—Admissibility.—Agency of Party to Contract.**—In an action for breach of contract, plaintiff may show by parol evidence that the other signer acted, in the execution of the contract, as defendant's agent, although it was not indicated in any way either by the contract or signature, since in contracts other than negotiable instruments and those under seal, parol evidence is admissible to charge the real principal, although executed in the name of the agent and nothing appears to show that he is not the principal. p. 477.
2. **APPEAL.—Review.—Presumptions.—Evidence.—Instructions.**—Where the evidence is not in the record, it will be presumed on appeal that the instructions given were applicable to the evidence, and they will not be held erroneous unless they would be so under any supposable state of facts which might have been given in evidence. p. 478.

From DeKalb Circuit Court; *Dan M. Link*, Judge.

Action by Anthony D. Schweitzer against Ida A. Boren. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Edgar W. Atkinson, for appellant.

Gatten & Stump, for appellee.

BATMAN, J.—Appellee in this action filed his complaint against appellant to recover damages for the breach of an alleged contract between them. The contract in question, on its face, purports to be a contract between appellee and one William G. Boren, whereby the latter rented to the former certain real estate for

farming purposes. It was filed with the complaint and made a part of the same as an exhibit. The complaint alleges that appellant was the owner of the real estate described in the contract in suit; that the contract was entered into on January 9, 1915, by and between appellee and appellant, by and through her husband, William G. Boren, acting as her agent, whereby appellant leased said real estate to appellee for the year ending March 1, 1916; that subsequently to the execution of the contract appellant ratified, affirmed and adopted the contract, and assured appellee that it would be carried out in good faith; that appellee had at all times been ready, willing, and able to perform the terms, conditions, and covenants of the contract to be by him performed, but that appellant had failed to perform the covenants and agreements of the contract to be by her performed, in this, that she had failed, neglected, and refused to deliver possession of said premises to appellee, or to comply with any of the terms and agreements of the contract; that by reason thereof appellee had been damaged in the sum of \$500, for which he demands damages. To this complaint appellant filed her demurrer for want of facts, on the ground, as stated in the memorandum filed therewith, that "the complaint and exhibit therein show that the defendant never entered into a contract with the plaintiff as therein alleged, but that it was the contract of a third person." This demurrer was overruled and appellant excepted. Appellant filed an answer in general denial, and three affirmative paragraphs, the contents of which are not material for the determination of the questions before us. The issues were closed by a reply in general denial; and trial was had by jury, resulting in a verdict for appellee for \$60 and judgment accordingly.

Appellant filed her motion for a new trial on the following grounds: (1) The court erred in admitting in

evidence plaintiff's exhibit "A," being the contract signed by plaintiff and one William G. Boren, and in no manner indicating in said contract that said William G. Boren signed such contract as agent, or in any other capacity than that of principal. (2) The court erred in giving instructions numbered 1 to 11 inclusive on its own motion and in giving each of them. (3) The court erred in giving instructions numbered 1 to 4 inclusive, asked and tendered by the plaintiff, and in giving each of them separately and severally. This motion was overruled and appellant duly reserved an exception. The errors relied on by appellant for reversal are the actions of the court in overruling appellants' demurrer to the complaint, and in overruling her motion for a new trial.

The result of this appeal turns on the sole question as to the right of appellee to show by parol evidence that William G. Boren was the agent of appel-

1. lant in the execution of the contract in suit, and that he executed the same on behalf of his principal, notwithstanding the fact that there was nothing in the contract or the signature thereto indicating that it was the contract of appellant. Our conclusion is that such evidence is admissible. It appears to be well settled that in contracts other than negotiable instruments and those under seal, parol evidence is admissible to charge the real principal in such contract, although it is executed in the name of the agent and nothing appears to indicate that he is not the principal therein. *Tiffany*, Agency (2d ed.) 233, 234; 1 *Mechem*, Agency §1176; 2 *Id.* §§1713-1716, 1733; 31 *Cyc* 1659; 1 *Am. and Eng. Ency. Law* 1055; *Lerned v. Johns* (1864), 9 *Allen* (Mass.) 419; *Byington v. Simpson* (1883), 134 *Mass.* 169, 45 *Am. Rep.* 314; *Briggs v. Partridge* (1876), 64 *N. Y.* 357, 21 *Am. Rep.* 617; *Brady v. Nally* (1896), 151 *N. Y.* 258, 45 *N. E.* 547; *Wm. Lindeke Land*

Co. v. Levy (1899), 76 Minn. 264, 79 N. W. 314; *Texas Land, etc., Co. v. Carroll & Iler* (1885), 63 Texas 48; *Huntington v. Knox* (1851), 7 Cush. (Mass.) 371. The following cases decided by the Supreme Court of this state are in accord with the rule above stated. *Roehl, Admr., v. Haumesser* (1888), 114 Ind. 311, 15 N. E. 345; *Tewksbury v. Howard* (1894), 138 Ind. 103, 37 N. E. 355. It therefore follows that the court did not err in overruling appellant's demurrer to the complaint, or in admitting in evidence the contract in suit.

Appellant also bases error on the action of the court in giving certain instructions, but has failed to bring the evidence given on the trial into the record.

2. Under such circumstances it is well settled that instructions given by the court will not be held erroneous, unless they would be erroneous under any supposable state of facts given in evidence. *McDonald v. State* (1909), 172 Ind. 393, 88 N. E. 673, 139 Am. St. 383, 19 Ann. Cas. 763; *Indianapolis Traction, etc., Co. v. Ripley* (1910), 175 Ind. 103, 93 N. E. 546; *Schuster v. State* (1912), 178 Ind. 320, 99 N. E. 422; *Michigan, etc., R. Co. v. Farrell* (1912), 52 Ind. App. 603, 99 N. E. 1026. An application of this rule renders such alleged errors unavailing, as it will be presumed that the instructions given were applicable to the evidence, since it is not in the record. *People's State Bank v. Ruxer* (1906), 38 Ind. App. 420, 78 N. E. 337; *Abney v. Indiana, etc., Traction Co.* (1907), 41 Ind. App. 53, 83 N. E. 387.

We find no available error in the record. Judgment affirmed.

NOTE.—Reported in 117 N. E. 526. Contracts for undisclosed principals, 55 Am. St. 916. See under (1) 17 Cyc 710.

BIMEL SPOKE AND WHEEL COMPANY v. LOPER.

[No. 10,039. Filed November 1, 1917.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Right of Appeal.—Certification of Questions of Law.—Res Adjudicata.*—Where, in a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, the Industrial Board before rendering an award certified a question of law to the Appellate Court under §61 of the act, the court's answer to such question was primarily for the information and guidance of the board in any case before it and it did not adjudicate the case which gave rise to the question, since the proceedings relating to the certified question were not adversary in character and there were no issues in a technical sense, and the nature of such proceedings was not changed by the mere fact that a third person, who appeared as appellant's counsel in the subsequent appeal, was permitted to file a brief as an *amicus curae*. p. 484.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeals.—Assignments of Error.—Sufficiency.—Scope of Review.*—Section 61 of the Workmen's Compensation Act, Acts 1915 p. 392, as amended by the act of 1917 (Acts 1917 p. 154), providing that in appeals from awards of the Industrial Board an assignment that the award of the full board is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts, does not prevent the appellant from presenting other questions of law, nor from making separate assignments of error as to each of the two propositions which the act authorizes to be presented by one assignment. p. 485.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeals.—Assignments of Error.—Sufficiency.*—Under §61 of the Workmen's Compensation Act, Acts 1915 p. 392, as amended by the act of 1917 (Acts 1917 p. 154), governing appeals from awards by the Industrial Board, on an appeal from an award of compensation an assignment of error that the full board erred in overruling defendant's motion to set aside an award made by one member of the board and also the award made by the full board, and to thereupon hear the parties, their representatives and witnesses, is sufficient. p. 486.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Award by Less than Full Board.—Review.—Discretion of Board.*—Under §60 of the Workmen's Compensation Act, Acts

1915 p. 392, as amended by the act of 1917 (Acts 1917 p. 154), providing for a review of an award of part of the Industrial Board by the full board, which "shall review the evidence, or if deemed advisable, hear the parties at issue," it is discretionary with the board whether it will review the evidence from the transcript of the former hearing or conduct a new hearing, and the board's action in this respect will not be reviewed on appeal unless it clearly appears that there has been an abuse of discretion. p. 486.

5. **MASTER AND SERVANT.—Workmen's Compensation Act.—Appeal.—Review.—Sufficiency of Evidence.—Inferences.**—Ultimate facts need not be proved by a particular kind of evidence, and an award of the Industrial Board is sustained by the evidence if there are facts in evidence from which the essential ultimate facts may reasonably be inferred, and the court on appeal will not disturb such finding, although inferences other than those drawn by the board might be reasonably warranted. p. 487.
6. **MASTER AND SERVANT.—Workmen's Compensation Act.—Award.—Review.—Evidence.—Sufficiency.**—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, for the death of a servant, evidence showing that while deceased was performing the duties of his employment, defendant's assistant superintendent, as an act of sport, turned the air from an air compressor upon him, causing deceased to quickly jerk and straighten his body, that immediately thereafter he became ill and died within two days, and that an autopsy disclosed that the intestines were diseased prior to the injury, but that the conditions found which caused death might have been the result of the accident to decedent, was sufficient to sustain a finding of the Industrial Board that the cause of death was injuries sustained by deceased as a result of having the compressed air turned upon him. p. 487.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Ida M. Loper against the Bimel Spoke and Wheel Company. From an award for applicant, the defendant appeals. *Affirmed.*

Horace F. Harvey, H. C. Austill and Joseph W. Hutchinson, for appellant.

Frank B. Jaqua and John F. LaFollette, for appellee.

FELT, J.—This is an appeal from an award of the full board, allowing appellee, Ida M. Loper, compensation for the death of her husband under the Indiana Workmen's Compensation law. The first and second assigned errors are in substance the same, and allege that the award of the full Industrial Board of Indiana is contrary to law. The third is as follows: "The full board erred in overruling the motion of the defendant (appellant) to set aside the award made in the cause by Charles R. Hughes and also to set aside the award made by the Industrial Board on June 4, 1917, and to thereupon hear the parties at issue, their representatives and witnesses, said motion having been filed on the 30th day of June, 1917."

The finding of facts and the award from which this appeal was taken are as follows: "Be it remembered that pursuant to notice fixing the time and place therefor, this cause was called for review before the full board at its office in the state house on the 31st day of March, 1917, at three o'clock p. m., that the plaintiff appeared by John F. LaFollette, her attorney, and the defendant appeared by Horace F. Harvey, its attorney. And the full board having heard the argument of counsel, having reviewed the evidence and being duly advised in the premises, finds that on the 28th day of September, 1916, one James F. Loper was in the employment of the defendant as a drill press operator at an average weekly wage of \$14.30; that on said date, while he was engaged in his work as a drill press operator, the assistant superintendent of the defendant, under whom the said James F. Loper worked, as an act of sport and horseplay upon his part, turned the air from an air compressor maintained at said time in the defendant's factory, upon the said James F. Loper in the region of the rectum; that the turning of said air upon the said

James F. Loper at said time caused him to quickly jerk and straighten his body; that at the time the said James F. Loper was suffering from an abscess in the region of the gall bladder; that the turning of said air upon him aforesaid by the defendant's assistant superintendent, causing him to suddenly jerk and strain himself, ruptured said abscess and resulted in acute general peritonitis, which caused his death on the 30th day of September, 1916; that the defendant, by and through its assistant superintendent, had actual knowledge of the injury of the said James F. Loper at the time that it occurred; that the air compressor in the defendant's factory was used for the purpose of cleaning machinery, and long prior to the 28th day of September, 1916, the employees had established the custom of using the same to 'brush' their clothes, by which is meant that it was used to blow the dust and dirt off their clothing; that said employees had also formed the habit of using said compressor in acts of sport or horseplay by turning the air upon one another, which act is known among them as 'goosing'; that the said James F. Loper had frequently participated in such sport; that such conduct of the employees was carried on with the actual knowledge and acquiescence of the defendant's assistant superintendent; that he in fact actually participated therein and no objection whatever was ever made to such conduct upon the part of employees; that said air compressor had a pressure of about sixty pounds at the time that it was turned upon him, the said James F. Loper, by the defendant's assistant superintendent; that at the time said air was turned upon him, the said James F. Loper was not participating to any extent in the sport or horseplay of the defendant's assistant superintendent; that the said James F. Loper left surviving him as his sole and only dependents, the plaintiff, Ida M. Loper, his wife, Charles M. Loper, his son, 12 years of age, and

Loyd M. Loper, his son, 8 years of age; that at the time of his injury and death the same James F. Loper was living with his said wife and children as a family and they were at that time wholly dependent upon him for support; that the defendant did not furnish the said James F. Loper an attending physician for the treatment of his injury and has not paid his burial expenses or any part thereof.

"Ruling of Law: The question as to whether the death of James F. Loper arose out of his employment, was certified by the Industrial Board to the Appellate Court in case No. 9947. Said court, on the first day of June, 1917, held that his death arose out of his employment.

"Award: It is therefore considered and ordered by the full Industrial Board that the plaintiff be, and is hereby awarded against the defendant, three hundred weeks' compensation at the rate of seven dollars and seventy-one cents per week—beginning on the 30th day of September, 1916, and burial expenses not exceeding one hundred dollars. It is further ordered that the defendant pay the costs of this action, taxed at four dollars and forty-five cents.

"Dated this fourth day of June, 1917."

Appellee filed a verified answer to the assignment of errors, in which she set up the details of the hearing before a single member of the Industrial Board, the application for a review by the full board, and the fact that, while her claim was so pending, the full board certified to the Appellate Court the question of law upon the facts substantially as above stated as to the employment, the injury, the death and the dependents of the deceased, viz.: "Upon the foregoing facts, did the injury and death of the employe arise out of his employment, within the meaning of the Indiana Workmen's Compensation Act?" That on June 1, 1917, said court

answered the foregoing question in the affirmative in a written opinion by Caldwell, J. *In re Loper* (1917), 64 Ind. App. 571, 116 N. E. p. 324. That appellant by its counsel asked and was granted leave to appear and file briefs in said proceedings, and did file a brief on the question before the court; that by reason thereof all questions involved in this appeal were, or might have been, litigated and adjudicated, and appellant is bound thereby and should not be heard to again present any questions relating to the aforesaid award.

The facts above set out show that the award by the full board was not made until June 4, 1917, after the opinion of this court in answering the certified

1. question aforesaid had been rendered on June 1, 1917. Section 61 of the act (Acts 1915 p. 392) authorizes appeals to this court "for errors of law" and also provides that: - "The board, of its own motion, may certify questions of law to said appellate court for its decision and determination." This cause was not before the court by reason of the proceedings relating to the certified question of law. The character of the proceedings was not changed by the fact that appellant's counsel was permitted to appear and file a brief, as an *amicus curae*. Whatever view may be taken of the purpose and effect of the proceedings under the statute where the Industrial Board certifies questions of law to this court and such questions are answered by the court, we think it cannot be held that such proceeding is an adjudication of the case which gave rise to the question, for it readily appears that there are no adverse parties to such proceeding, no issues in a technical or legal sense, and consequently no parties or their privies to be bound by the principles and rules of former adjudication.

The board is the moving party in such instances and primarily, at least, the questions are answered for the

information and guidance of the board in any case before it where such question arises. The fact that this court permitted an attorney who now appears as counsel for the appellant to appear as an *amicus curae* in the proceedings relating to the certified question of law, and the further proposition that the concrete facts on which such question was propounded are in substance identical with the main facts involved in the subsequent appeal where there are adverse parties, are to be considered as merely incidental matters rather than facts that are controlling in this appeal or binding upon the parties under the rule of *res adjudicata*. Certainly the answer to the question under such circumstances would be influential and would be followed by the court in the actual case involving such facts, if presented, unless some good and sufficient reason appeared for doing otherwise, but this would not be done on the theory that the case had formerly been before the court and the questions now presented therein determined under the rule of former adjudication.

The act contemplates proceedings as free as possible from technicalities which may hinder the due administration of the law. The provision permitting the board to certify legal questions for decision by this court was not intended to serve the purpose of adjudicating particular cases, but as a means of expediting the business of the board, and giving the relief contemplated by the act with a minimum of legal procedure. *Union Sanitary Mfg. Co. v. Davis* (1916), 63 Ind. App. 548, 114 N. E. 872.

Appellee further contends that under the provisions of §61 of the Workmen's Compensation Act, *supra*, as amended by the act of 1917 (ch. 63, Acts 1917

2. p. 154), no question is presented by the third assignment of error. The amendment provides that an assignment that the award of the full board is

contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts, but such provision does not prevent the appealing party from presenting other errors of law under the statute if there be such in the proceedings before the full board, nor from making separate assignments of

error as to each of the two propositions which the

3. statute authorizes to be presented by one assignment. As against the objection urged by appellee, we deem the third assignment of error sufficient. §696 Burns 1914, §654 R. S. 1881.

Section 60, as amended by the Acts of 1917, *supra*, provides for review of an award made by less than all

the members of the full board, and further pro-

4. vides that the full board "shall review the evidence, or, if deemed advisable, hear the parties at issue, their representatives and witnesses as soon as practicable and shall make an award and file same, with a finding of the facts on which it is based, and the rulings of law by the full board if any, and send a copy thereof to each of the parties in dispute, in like manner as specified in the forgoing section." The evidence heard by Charles R. Hughes, a member of the Industrial Board, at the first hearing was taken down in shorthand, transcribed, and filed with the papers before the full board. Appellant by verified motion sought to show that the transcript was defective, incomplete, and inaccurate, and to have the same set aside, and the whole proceeding gone into before the full board, the witnesses called and the evidence reheard independently of the aforesaid transcript. The board overruled the motion, heard the parties by counsel and made its finding and award based on the transcript of the evidence. The statute gives the full board discretionary power to review the evidence in the manner adopted in this case,

or, "if deemed advisable," to proceed as appellant requested in this instance.

The transcript of the evidence was and is sufficient to present the substance of the material facts. The circumstance of the inaccuracies and alleged omissions are not different from many things incidental to trials and proceedings, on account of which parties after the hearing or trial feel dissatisfied and believe their case could have been placed in a more favorable light. The board exercised its discretion and this court will not review such action except in cases where it clearly appears that there has been abuse of the discretionary power lodged in such tribunal.

Under the first and second assignments of error appellant seeks to present the question that there is a

total failure of evidence to show that the accident to the deceased described in the findings of the board was a proximate, contributing cause of his death, and contends that the undisputed evidence shows that he died from peritonitis. Ultimate facts need not be proved by any particular kind or class of evidence. If there are facts and circumstances proven in the case from which the essential ultimate facts may reasonably be inferred, and the court or board whose duty it is to pass upon such facts has drawn therefrom the essential ultimate facts, this court will not disturb such finding, though other and different facts might be inferred therefrom by other minds equally as fair and reasonable.

We deem it unnecessary to set out the evidence in detail. The deceased had complained of some abdominal trouble and had taken treatment therefor

6. shortly before the fatal accident, but had continued to work regularly. He was working when injured in the manner set forth by the Industrial Board, and there is no claim that he was at that time partici-

pating in the use of or sport with the air hose. His injury occurred on the evening of September 28, and he died on September 30, at 9:30 p. m. The testimony shows that immediately after the accident he suffered pain, became sick, was taken home, called a physician immediately, a consultation of physicians was held and an abdominal operation performed on September 29, the day after the accident. There was inflammation of the bowels and abdominal walls, pus and serum were found in the abdominal cavity and a diseased condition in the region of the gall bladder of a character which indicated the parts had been affected before the accident; that the conditions found would not likely have resulted from a sudden jerking or wrenching of the body if there had been no diseased condition prior to the day of the accident. One of the physicians testified that in his opinion the conditions found at the autopsy might have resulted from an accident which later caused his death; that the diseased condition of the intestines began before the accident occurred. The facts are sufficient to bring the case within the rules of law already declared by this court. *In re Bowers* (1917), *ante* 128, 116 N. E. 842.

There is evidence tending to support the finding of facts. The award is not contrary to law. The award of the full board is therefore affirmed, and five per cent. is added to the award by virtue of §3 of chapter 63 of the Acts of 1917, *supra*.

NOTE.—Reported in 117 N. E. 527. Workmen's compensation: review of findings of Industrial Board, L. R. A. 1916A 163, 266, 1917D 186, Ann. Cas. 1916B 475, 1918B 647.

IN RE MARANOVITCH.

[No. 10,056. Filed November 1, 1917.]

1. **STATUTES.—Construction.**—A statute is to be construed as a whole and that construction adopted which will carry out the intent of the legislature. p. 491.
2. **MASTER AND SERVANT.—Workmen's Compensation Act.—Construction.—Loss of Fingers.—Award.**—Section 31 of the Workmen's Compensation Act, Acts 1915 p. 392, prescribing a schedule of compensation for the loss of a finger, thumb and other specific injuries, and providing that in all other cases of permanent partial disability compensation shall be paid in the amount determined by the Industrial Board, not to exceed fifty-five per cent. of the average weekly wages for 200 weeks, was intended to apply to all cases of permanent partial disability and is mandatory as to the injuries specified, but where an employee in one accident loses two or more fingers the amount of compensation will not be determined by multiplying the allowance for one finger by the number lost, since otherwise compensation for the loss of a thumb and four fingers could exceed that for a whole hand, a result not intended by the legislature, but in such a case the award will be fixed by the board under the general clause for a period not to exceed 200 weeks, except that an allowance for a less injury cannot, unless the circumstances are extraordinary, be made for more than provided in the specific schedule for a greater injury. p. 491.

From the Industrial Board of Indiana.

Certified questions of law.

Proceedings under the Workmen's Compensation Act in the matter of one Maranovitch. Certified question of law by the Industrial Board. *Questions answered.*

IBACH, P. J.—We are asked by the Industrial Board of Indiana to determine the number of weeks for which an injured employee is entitled to compensation upon the following facts: On October 31, 1916, Joe Maranovitch was in the employ of the American Sheet and Tin Plate Company at an average weekly wage of \$21.42. On said date, with the personal knowledge of the employer,

he received a personal injury by accident arising out of and in the course of his employment, resulting in the loss by separation of the thumb and all the four fingers of the right hand at the metacarpal articulation.

The foregoing facts show that the injuries received by Maranovitch resulted in what is termed in the Workmen's Compensation Act as a "permanent partial disability." We are therefore required by the question presented to construe §31 of that act. It reads: "For injuries in the following schedule the employe shall receive in lieu of all other compensation a weekly compensation equal to fifty-five per cent. of his average weekly wages for the periods stated against such injuries respectively, to-wit: (a) For the loss by separation of not more than one phalange of a thumb or not more than two phalanges of a finger . . . 15 weeks; (b) for the loss by separation of more than two phalanges of a finger or of a whole finger or toe . . . 30 weeks; (c) For the loss by separation of more than one phalange of a thumb or of a whole thumb . . . 60 weeks; (d) for the permanent and irrecoverable loss of the sight of one eye or its reduction to one-tenth of normal vision with glasses . . . 100 weeks; (e) for the loss by separation of one foot at or above the ankle joint . . . 125 weeks; (f) for the loss by separation of one hand at or above the wrist joint . . . 150 weeks; (g) for the loss by separation of one leg at or above the knee joint . . . 175 weeks; (h) for the loss by separation of one arm at or above the elbow joint . . . 200 weeks; (i) for the permanent and complete loss of hearing . . . 75 weeks. In all other cases of permanent partial disability, including any disfigurement which may impair the future usefulness or opportunities of the injured employe, compensation in lieu of all other compensation shall be paid when and in the amount determined by

the Industrial Board, not to exceed fifty-five per cent. of average weekly wages per week for a period of two hundred weeks."

A statute is to be construed as a whole and that construction adopted which will carry out the intent of the legislature and avoid absurdities. Applying

1. these principles of construction to the statute before us it is manifest that in enacting §31, *supra*, the legislature intended to provide for all
2. cases of permanent partial disability, and in fixing the schedule therein to provide a definite amount for certain specific injuries, the amount being graduated according to the magnitude of the injury. To the extent of such specific provisions the law is mandatory, and being mandatory cannot be enlarged beyond their express terms. The language of the last paragraph of said section is broad and comprehensive, "all other cases of permanent partial disability," and leaves no room for construction between the injuries specifically provided for in the schedule and those which fall under the general provision.

We must conclude, therefore, that the legislature never intended that for the loss of two or more fingers on one hand in the same accident that the amount of compensation could be arrived at by multiplying the schedule allowance for one finger by the number of fingers lost. If this method of calculation were intended by the legislature, it would lead to an absurd result, e. g., for the loss of the entire hand at or above the wrist the schedule allows a compensation for a period of 150 weeks, while by multiplying the specific allowance for each finger and adding the allowance for a thumb we would obtain a total period of 180 weeks during which compensation might be paid.

An injury such as we have here must, we think, fall under the general provision above referred to. Such

provision when standing alone would seem to give the board discretion in all such cases not to exceed 200 weeks, but, when this section is read as a whole and taken in connection with the general plan and purpose of the act, it is clear, we think, that the legislature never intended, generally speaking, by such general provision that the court could in its discretion allow for a less injury more than was provided in the specific schedule for a greater injury. If, however, such unusual and extraordinary facts should arise, of which we are unable to conceive of any instance at this time, in which in the judgment of the board an injury by severance of a part and less than the whole member would entitle the injured employe to compensation for a greater period than that specifically provided for in the schedule for the loss of the whole, the board would be authorized to resort to the general provision and grant such allowance for such a period as in its judgment would be proper not to exceed 200 weeks.

NOTE.—Reported in 117 N. E. 530. See under (1) 12 Am. St. 827, 36 Cyc 1106, 1111, 1128. Workmen's compensation: amount recoverable by workman partially or totally incapacitated, L. R. A. 1916A 136.

BRICKER v. WHISLER.

[No. 9,322. Filed November 1, 1917.]

1. **APPEAL.**—*Sufficiency of Evidence.*—*Scope of Review.*—*Presumptions.*—On appeal every presumption lies in favor of the successful party, and in determining the sufficiency of the evidence to support the judgment, the court will look only to the evidence most favorable to appellee. p. 497.
2. **TROVER AND CONVERSION.**—*Burden of Proof.*—The vendor in an action for the conversion of certain remains of a dismantled building claimed to have been reserved orally, has the burden of proving his allegations by proper evidence. p. 497.

3. **TROVER AND CONVERSION.**—*Judgment.*—*Evidence.*—*Sufficiency.*—Where a vendor of realty, alleging that he orally reserved a dismantled building located thereon, sued the vendee for the conversion of loose and detached parts of the building and of parts remaining affixed to the land, but failed to prove the value of the loose materials, a judgment in his favor for such detached parts could not be sustained. p. 497.
4. **FRAUDS, STATUTE OF.**—*Conveyance of Land.*—*Parol Reservation.*—As between grantor and grantee, the grantor cannot enforce a parol reservation of any part of the realty conveyed in his deed. p. 498.
5. **FIXTURES.**—*Nature of.*—*Manner of Annexation.*—*Adaptability.*—*Intention of Party Making Annexation.*—In determining whether property annexed to the freehold is personal or real property, the real or constructive annexation of the article, its adaptability to the use of the land to which it is attached, and the intention of the party making the annexation, are considerations of controlling influence. p. 498.
6. **FIXTURES.**—*Building.*—*Intention of Party Annexing to Land.*—Where an abandoned glass factory was intended at the time of its erection as a permanent building, and its physical connection with the land remained the same as when originally built, it became a part of the realty. pp. 499, 500.
7. **FIXTURES.**—*Between Vendor and Purchaser.*—*Separate Ownership of Building and Land.*—*Knowledge of Purchaser.*—*Annexation.*—Where a vendor of realty had subsequently to acquiring his title, purchased from a third person an abandoned glass factory located on the land, the fact that a separate ownership of building and land had existed and that part of the building had been removed by its former owner, was not controlling in determining, as between the vendor and his grantee, whether the building, which was annexed to the land, was real or personal property, especially where the grantee had no knowledge of the separate ownership. p. 499.
8. **FIXTURES.**—*Permanent Building.*—*Parol Reservation by Vendor.*—*Effect.*—A parol agreement between grantor and grantee, prior to, or contemporaneous with, a conveyance, to the effect that a part of a permanent building which is attached to and part of the freehold conveyed by the grantor is personal property will not make such property personalty which may be reserved orally, notwithstanding the vendor's written warranty of the freehold to the contrary. p. 500.

From the Marion Circuit Court (12,671); *Louis B. Ewbank*, Judge.

Action by John Whisler against George Bricker. From a judgment for plaintiff, the defendant appeals. *Reversea.*

Tindall & Tindall and *A. G. Cavins*, for appellant.

John Lockeridge, Bachelder & Bachelder and *Arthur C. Van Duyen*, for appellee.

HOTTEL, C. J.—This is an appeal from a judgment for \$100, rendered against appellant by the Marion Circuit Court in an action brought by appellee before a justice of the peace of Hancock county, to recover damages for the alleged conversion of certain stone, bricks and building materials located on real estate in Hancock county, Indiana. The overruling of his motion for new trial is the only error assigned by appellant and relied on for reversal. The motion contains four grounds, but appellant in his brief asks this court to give its consideration to but one question, viz.: "May a grantor of real estate under a general warranty deed containing no reservation, by parol, reserve a building which was originally constructed as a permanent accession to the realty, and which is still annexed thereto in substantially the same manner as when originally built?"

It is claimed by appellant that this question is presented by those grounds of his motion for new trial which respectively challenge the verdict as not being sustained by sufficient evidence and as being contrary to law, that the law requires a negative answer to said question, and that such an answer will necessitate a reversal of the judgment below. As we gather appellee's contention from his briefs, he, in effect, concedes the correctness of the legal proposition for which appellant contends, and that it requires a negative answer to the question suggested, but insists that there was undisputed evidence showing that at least a part of the prop-

erty, claimed by appellee to have been appropriated by appellant, was personal property, and that there was some evidence from which the trial court might properly have inferred that all of said property was personal property; that for this reason said law question is not presented by the record, and that, there being no other question presented by appellant, the judgment below must be affirmed.

The evidence pertinent, and necessary, to a correct understanding of the questions thus presented is to the following effect: In 1908 appellee bought certain lots from one Forkner. Subsequently, and about two years before his sale and conveyance to appellant, he bought from one Cook what remained of a glass factory on these lots. Cook had bought this building, apart from the lots, and had removed parts of it. In October, 1912, appellee owned said lots and building. At that time the building had been so wrecked that only part of the frame thereof, the ground floor of fire brick laid in sand, part of a second floor of wood, and a stone foundation for a part of the second floor, and some stone piers for furnaces remained. The siding, roof, part of a second floor, the doors and windows and their frames had been removed. Part of the frame had been removed, or had fallen, and was on the ground. The greater part of the frame, however, was standing. Appellee testified that this frame was made up of 2x4, 2x8, and 4x4 timbers nailed together. The stone foundation for a part of the building remained practically intact, except that a few stones had fallen therefrom and were on the ground. There were several stone piers which had supported furnaces. These furnaces had been removed, and the piers were more or less broken down, and stones had fallen from them. Some of the witnesses testified that the building rested on sills of large timbers, that there were walls for these sills, and that

there were stone pillars set in the ground, the stones of which had been laid in mortar, and upon these pillars the posts of the building were placed. These facts were, however, denied by other witnesses, who testified that there was no foundation, but just posts set in the ground. It is uncontroverted, however, that the parts of the building then standing were fastened together and attached to the soil in the same manner, and were in the same condition as when originally erected. It also appears from the record that the structure was then practically in the same condition as when appellee bought it from Cook. There is evidence tending to show that the building had been erected about twelve years before the sale to appellant, that it had been abandoned as a factory about three years before such sale, and that Cook had removed parts of the building about two years before such sale. On October 16, 1912, appellee conveyed said land to appellant, by warranty deed, containing no mention of this structure, either by way of reservation or otherwise. Appellee, however, testified that he orally reserved all the materials on the premises, including all the frame of the building, except a part thereof eight feet by thirty feet, which contained 500 feet of lumber, that the part of the frame so reserved contained 5,000 feet of lumber, that the part not reserved was joined to that reserved by nails "and 2x8 stuff on top for floor." Appellant testified and introduced other evidence to the fact that there was no reservation of anything by appellee. The evidence showing the taking of the property claimed to have been reserved is to the effect that appellant hauled away stone, and that he was seen "hauling this material away." The record does not show specifically that any material, other than the frame standing at the time of the sale to appellant, and the stone foundation above referred to, was removed. The evidence on this point

refers generally to stone and to "material." All the evidence as to the value of material related generally to the material, there being no evidence of value as to any material separated from the building and lying on the ground, as distinct and separate from that remaining attached to the real estate.

The decision and judgment being for appellee, he has every presumption in his favor, and in determining whether said decision is sustained by sufficient

1. evidence we must look alone to that most favorable to him. We think it clearly appears from the evidence that, while there may have been some brick and material which had been separated from said building, lying on the ground, there was no attempt on the part of appellee to prove the quantity or value of such material, separate and independent of that part of the building which remained attached to the real estate.

While this court will search the record to affirm, and indulge every presumption in favor of the action of the trial court to avoid reversal, it cannot indulge

2. presumptions wholly unsupported by the evidence. The burden was upon appellee to prove his case by proper evidence, and it clearly appears from the evidence upon the subject of values that the only theory upon which he made his case, and the only theory upon which the decision and judgment of the trial court could have been predicated, under the evidence, was that appellee was entitled to recover not only for that part of the material involved that was lying on the ground, separated from the real estate, but also for that part of the same which was attached to the real estate, and, because of the absence of any evidence as to the quantity or value of the material on the ground, separate from that attached to the real estate, there was no evidence upon

which a judgment for appellee in any amount for such separated material alone could rest. It follows, we think, that a correct disposition of this appeal requires us to determine the question suggested by appellant.

It cannot be seriously contended, and, as before indicated, is not, we think, contended by appellee, that, as between grantor and grantee, the grantor can

4. enforce a parol reservation of any part of the real estate conveyed in his deed. As pertinent to this question, see *Bailey v. Briant* (1889), 117 Ind. 362, 363, 20 N. E. 278; *Armstrong v. Lawson* (1881), 73 Ind. 498; *Adams v. Tully* (1904), 164 Ind. 292, 294, 73 N. E. 595; *Owens v. Lewis* (1874), 46 Ind. 488, 15 Am. Rep. 295.

It follows also that, as incidental to the question presented by appellant, we must determine whether, under the evidence, that part of the property here in-

5. volved which was standing on and attached to the real estate sold by appellee to appellant and conveyed by warranty deed was a part of the real estate so sold. In determining whether property annexed to the freehold is personal or real property, the following rules are of controlling influence: (1) Real or constructive annexation of the article in question to the freehold. (2) Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold. *Binkley v. Forkner* (1889), 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *McFarlane v. Foley* (1901), 27 Ind. App. 484, 60 N. E. 357, 87 Am. St. 264; *White v. Cincinnati, etc., Railroad* (1904), 34 Ind. App. 287, 71 N. E. 276; *Dutton v. Ensley* (1898), 21 Ind. App. 46, 51 N. E. 380, 69 Am. St. 340; *Parker Land, etc., Co. v. Reddick* (1897), 18 Ind. App. 616, 47 N. E. 848.

The evidence shows without contradiction that the material and timbers here involved, which appellant claims were a part of the real estate conveyed to

6. him, were in fact a part of a glass factory which had been erected on said real estate. There can be no doubt, under the evidence, that such factory building when originally built was intended as a permanent building, and that it became a part of the real estate on which it was located.

Appellee, however, attaches importance to the fact that before appellant's purchase and deed there had been a separate ownership of the real estate and

7. said building, during which period the owner of the building had torn part of it down and removed it, leaving only that part which is the subject of this controversy. Whether a case might arise in which such a state of facts would have a controlling influence in the determination of whether the property should be treated as real or personal property we need not and do not determine. It is sufficient, for the purposes of this case, to say that, so far as the evidence discloses, nothing appears from the separate ownership of the real estate and the building which showed that the building, other than that part which was torn down and separated from the real estate, was treated as personal property by the then owners, nor is there any evidence to show that appellant had any knowledge of such separate ownership or of its character. The evidence further shows that appellee bought the building, or what remained of it, and thereby combined in himself the ownership of both the ground and the building upon which it stood. He then sold and conveyed the real estate by warranty deed without express mention of said building, or any part thereof, by reservation or otherwise. It also appears from the uncontradicted evidence that when appellee conveyed said real estate

to appellant the frame and timbers of said building remained standing on and attached to said real estate in substantially the same condition that they were in when appellee bought the building from Mr. Cook, and in substantially the same condition as when the building was erected. In other words, the evidence here

6. shows that said glass factory when erected was intended as a permanent building, that it became and was part of the real estate to which it was attached, that at the time of its erection the material in controversy became a part thereof and hence a part of the real estate to which such building was attached, and when appellee sold said real estate to appellant there had been no change affecting the physical connection of said part of said building with the real estate to which it was originally attached, and of which it had become a part.

The question, therefore, which we are required to determine under the facts of this case, put in a form not materially different from that suggested by ap-

8. pellant, is: Will a parol agreement between grantor and grantee (prior to or contemporaneous with a conveyance) to the effect that a part of a permanent building which is attached to and part of the freehold conveyed by the grantor is personal property, in fact, make such property personalty, and allow its reservation by such grantor, notwithstanding his written warranty of the freehold to the contrary?

Appellee in effect insists that this question requires an affirmative answer, and in support of his contention cites the following cases: *Pea v. Pea* (1871), 35 Ind. 387; *Williams v. Frybarger* (1893), 9 Ind. App. 558, 37 N. E. 302; *Frederick v. Devol* (1860), 15 Ind. 357; *Rogers v. Cox* (1884), 96 Ind. 157, 49 Am. Rep. 152; *Young v. Baxter* (1876), 55 Ind. 188; *Harvey v. Million* (1879), 67 Ind. 90; *Heavilon v. Heavilon* (1868), 29

Ind. 509; *Carver v. Louthain* (1872), 38 Ind. 530; *Fitzer v. Fitzer* (1868), 29 Ind. 468. Of these cases, appellee specifically relies on *Pea v. Pea, supra*, and *Rogers v. Cox, supra*. The facts in each of these cases are easily distinguishable from the facts which we have indicated as controlling in the instant case. It is true, however, that there is some language used in these cases, especially in the case of *Rogers v. Cox, supra*, that lends support to appellee's contention, but in each case the court expressly so limits the question actually decided that it is not in conflict with the principles upon which our conclusion in this case is based. So an examination of each of the cases cited by appellee which are pertinent to the question involved will disclose that the facts upon which they rest show that the reservation involved was not one between grantor and grantee, or that such reservation related either to growing crops, trade fixtures or buildings such as saw mills and the like which are movable and of a quasi-personal character in the sense that the agreement and intent of the parties may be controlling in determining whether they should be treated as real estate or personal property. In none of them did the thing held to be susceptible of reservation constitute an essential part of a permanent building attached to and forming a part of the real estate.

While there is some conflict in the decided cases, we think few, if any of them, sustain appellee's contention, or will permit an affirmative answer to the question last suggested. On the contrary, we think the weight of authority supports a negative answer to said question. In support of this conclusion, see *Owens v. Lewis, supra*; *Armstrong v. Lawson, supra*; *Adams v. Tully, supra*; *Pea v. Pea, supra*; *Bailey v. Briant, supra*; *Binkley v. Forkner, supra*; *Meyers v. Schemp* (1873),

67 Ill. 469; *Gibbs v. Estey* (1860), 15 Gray (Mass.) 587; *Ford v. Cobb* (1859), 20 N. Y. 344.

We therefore conclude that the trial court erred in overruling appellant's motion for new trial, and for this reason the judgment below should be and is reversed, with instructions to the trial court to grant a new trial, and for such other proceedings as are consistent with this opinion.

NOTE.—Reported in 117 N. E. 550. Fixtures: agreements to prevent fixtures from becoming part of the realty, effect, 19 L. R. A. 441; tests for determining what are fixtures, 105 Am. St. 646. See under (2) 38 Cyc 2078; (3) 38 Cyc 2088; (4, 8) 19 Cyc 213; (5, 7) 19 Cyc 1036-1048.

CONTINENTAL INSURANCE COMPANY v. BAIR ET AL.

[No. 8,983. Filed January 5, 1917. Rehearing denied June 22, 1917. Transfer denied November 1, 1917.]

1. **APPEAL.—Briefs.—Waiver of Error.**—Assignments of error are waived where appellant's brief fails to present any points or propositions relating thereto. p. 507.
2. **INSURANCE.—Fire Insurance.—Action on Policy.—Necessary Parties.—Plaintiffs.—Statutes.**—Under §§251, 263 Burns 1914, §§251, 262 R. S. 1881, all who join as plaintiffs must have an interest in the subject of the action, and be united in such interest, although the interest of the several parties joined need not be equal and may be severable, provided all have some common interest in the subject-matter of the action, and this rule applies in cases involving loss by fire where the owner of the property insured and the holder of an encumbrance thereon are joined in a suit against the insurance company on the policy, it appearing that the total loss exceeds the amount of the encumbrance. p. 510.
3. **PLEADING.—Complaint.—Requisites.—Avoiding Defense.**—Where the facts pleaded show a cause of action, and also a defense thereto, the complaint is insufficient unless it also contains other averments which avoid such defense. p. 511.
4. **INSURANCE.—Fire Insurance.—Indorsement of Policy.—Equitable Relief.**—Where the holder of a fire insurance policy notified the insurer of the execution of a mortgage on the

- premises insured and obtained the insurer's agreement to indorse the interests of the mortgagees upon the policy, as required by its provisions, on the insurer's failure to comply with its agreement equity will regard that as done which in good conscience ought to have been done. p. 512.
5. **INSURANCE.—Fire Policy.—Action.—Complaint.—Sufficiency.—Proof of Loss.**—In an action on a policy of fire insurance, a complaint alleging that due proof of loss was furnished the insurer within thirty-nine days of the fire and within sixty days allowed by §4622g Burns 1914, Acts 1911 p. 525, and the provisions of the policy, sufficiently shows as against demurrer that the proof of loss was made as required by the policy and statute. p. 514.
6. **INSURANCE.—Fire Insurance.—Action on Policy.—Mortgagees.—Insurable Interest.**—Where the interest of mortgagees in a house covered by a fire insurance policy, although not in fact indorsed on the policy, was regarded by equity as having been so indorsed, the mortgagees had an insurable interest in the insured premises and could maintain an action against the insurer to recover for loss by fire. p. 515.
7. **INSURANCE.—Fire Insurance Policy.—Construction.—Condition against Encumbrances.**—A provision in a fire insurance policy that it shall be null and void if the property should become mortgaged or encumbered, relates to liens voluntarily placed on the property by the insured, and does not apply to judgments thereafter obtained against him or other liens created by law, such as a money judgment in a suit for divorce. p. 516.
8. **APPEAL.—Answers to Interrogatories.—Scope of Review.**—In reviewing the ruling on a motion for judgment on the jury's answers to interrogatories the court on appeal can consider only the general verdict, the interrogatories and answers thereto, and the issues formed by the pleadings. p. 520.
9. **APPEAL.—Review.—Answers to Interrogatories.—General Verdict.—Presumptions.**—In passing on a motion for judgment on the jury's answers to interrogatories, every reasonable presumption is indulged in favor of the general verdict, and the answers will not overcome it if it can be sustained by any facts provable under the issues. p. 520.
10. **INSURANCE.—Fire Insurance.—Contract.—Proof of Loss.—Necessity.—Statute.**—Under §4622g Burns 1914, Acts 1911 p. 525, providing that, when a policy of fire insurance requires preliminary proofs of loss, they shall be furnished by the insured within sixty days, and, if objected to by the insurer as defective, they shall be returned, together with a specification of defects, within ten days, in which case the insured is allowed

ten days to remedy the objections or make affidavit that he is unable to do so, where the proofs of loss submitted by insured could not be made more definite and specific, and where before the expiration of the ten-day period following their return to insured with objections thereto, and before service of formal notice of rescission, the insurer informed the insured that it denied all liability under the policy, and also stated that its position as regards liability could not be changed by any modification of proofs, insured was not required to make any further proofs. p. 520.

11. **INSURANCE.—Fire Insurance.—Proofs of Loss.—Sufficiency.—Statute.**—Proofs of loss furnished within sixty days after the fire showing that the house insured was totally destroyed on a certain date, that the loss amounted to a sum named, that insured owned the property in fee simple, and that it was encumbered by a mortgage, the name of each mortgagee and the amount of their respective claims being set out, furnished a detailed schedule of the claim, stated the character and extent of the interest of other parties, gave full information as to the encumbrance, thereby substantially complying with the terms of the policy and the requirements of §4622g Burns 1914, Acts 1911 p. 525, as to proofs of loss. p. 520.
12. **INSURANCE.—Fire Insurance.—Proofs of Loss.—Objections.—Sufficiency.—Statute.**—Section 4622g Burns 1914, Acts 1911 p. 525, providing that, when a fire insurance policy requires the making of a preliminary proof of loss, the insured shall furnish such proofs within sixty days, and, if the proofs furnished are objected to by the insurer as being defective, they shall be returned to insured with a specification of defects claimed, in which case he shall remedy the objections by amendment or make affidavit that he is unable to do so, contemplates a good-faith claim that the preliminary proofs are defective and a definite statement of omitted facts in the notice of defects in such proof, which requirements are not met by objections to proofs of loss that they are defective because failing to furnish a detailed schedule of claim, to state if any other person had any interest in the property, to state knowledge and belief as to the time and origin of the fire, and because encumbrances had been placed on the property without the insurer's knowledge and consent, where insured had given the insurer notice of the encumbrance on the property, and, within sixty days after a fire, had made proof that the house insured had been totally destroyed on a certain date, that the damage amounted to a sum named, that he owned the property in fee simple encumbered by a mortgage, and stating the

- name of each mortgagee and the amount of their respective claims. p. 521.
13. **INSURANCE.—Fire Insurance.—Insufficient Proofs of Loss.—Failure to Furnish Affidavit.**—Under §4622g Burns 1914, Acts 1911 p. 525, relating to proofs of loss by fire, the failure of insured to submit an affidavit showing that proofs of loss returned as defective could not be made more specific, within ten days from the receipt of the insurer's objection thereto, was the omission of only a technical detail, where the proofs furnished, fairly construed, supplied all the information called for, and were not subject to the objections made. p. 521.
14. **INSURANCE.—Fire Insurance.—Authority of Agent.—Scope.—Indorsement of Mortgage.**—The written authority of the local agent of a fire insurance company empowering him to effect insurance, to countersign, issue, and renew policies, to consent in writing to their assignment and transfer, and to collect premiums, authorized him to consent to the encumbrance by mortgage of insured property, and to indorse the consent of the insurer thereto on the policy, so that the agent's agreement to make such indorsement was binding on the insurer. pp. 522, 523, 530.
15. **INSURANCE.—Fire Insurance.—Mortgage.—Indorsement of Policy.**—The authorization of payment of a fire insurance policy to a mortgagee is a conditional assignment or transfer to the mortgagee of an interest in the policy. p. 523.
16. **INSURANCE.—Authority of Agent.—Construction.**—The written authority of an insurance agent is to be liberally and fairly construed, and a narrow and limited meaning is not to be given to it, unless the language employed clearly indicates that such was the intention of the parties. p. 523.
17. **INSURANCE.—Provisions of Policy.—Waiver.**—A stipulation in an insurance policy that none of its provisions can be waived by an agent except by the consent of the company indorsed on the policy may itself be waived either by express agreement or by conduct. p. 525.
18. **INSURANCE.—Provision of Policy.—Waiver.—Indorsement of Mortgage.**—Where a fire insurance company, through its authorized agent, obtained knowledge of a mortgage on insured premises and agreed to place on the policy the requisite clause to make it payable to the mortgagee, but failed for seven months to so indorse the policy, the insurer waived the condition requiring its consent to be indicated in writing upon the policy. p. 525.
19. **EVIDENCE.—Inferences from Facts Proved.—Sufficiency.**—It is not essential that facts be established by direct and positive testimony, and it is sufficient on appeal if from the facts and

circumstances proved the jury may reasonably have inferred the ultimate and essential facts necessary to sustain the verdict. p. 526.

20. **INSURANCE.—Fire Insurance.—Policy.—Construction.**—Where a policy of fire insurance was written by a local agent, and by special arrangement was kept in the agent's office and was not seen by insured until after loss by fire, the contract was not to be construed with the same strictness generally obtaining in the interpretation of written instruments where the parties have like opportunity to be advised as to their provisions. p. 527.
21. **INSURANCE.—Fire Insurance Policy.—Presumption Against Forfeiture.**—Where the premium has been paid on a policy of fire insurance and the risk has attached, every presumption will be indulged in favor of the good faith of the parties and to avoid a forfeiture. p. 527.
22. **WITNESSES.—Corroboration.—Impeachment.**—Where a witness has been impeached by the testimony of another witness that he had made statements out of court inconsistent with his testimony, it is proper to corroborate such witness by proving that he had also made previous statements in harmony with his testimony at the trial, but the rule does not permit the introduction of corroborating testimony to support the testimony of a witness in chief on the ground that his evidence on cross-examination tends to contradict or weaken his testimony in chief. p. 527.
23. **TRIAL.—Instructions.—Construction.**—Instructions should be considered together. p. 528.
24. **INSURANCE.—Fire Insurance.—Provisions of Policy.—Waiver.**—Provisions of a fire insurance policy rendering it void if the property insured should be encumbered without the written consent of the company indorsed on the policy, that no agent has authority to waive any condition of the policy except as therein stated, and that no waiver is binding on the company unless written upon, or attached to, the policy, are stipulations in favor of the company, which it could waive by express agreement or by conduct. p. 531.
25. **INSURANCE.—Fire Insurance.—Provisions of Policy.—Waiver.—Indorsement of Mortgage.**—Provisions in a policy of fire insurance rendering it void if the property insured should be encumbered without the written consent of the company indorsed on the policy, and that no stipulation of the policy can be waived except by written indorsement thereon, are waived where the company's agent, acting within the scope of his authority, agreed to indorse on the policy the insurer's consent to a mortgage of the insured property. p. 532.

Continental Ins. Co. v. Bair—65 Ind. App. 502.

From Tipton Circuit Court; *James M. Purvis*, Judge.

Action by Lytel Bair and others against the Continental Insurance Company. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

Burke G. Slaymaker, for appellant.

Alfred Ellison, for appellees.

FELT, C. J.—This is a suit by appellees, Lytel Bair and others, against appellant, Continental Insurance Company, to recover on a policy of fire insurance. The other appellees are alleged to hold liens on the property covered by the policy. From a judgment in appellee's favor for \$600 appellant has appealed and assigned as error: (1) The overruling of its demurrer to the complaint; (2) the sustaining of the separate demurrer to the eighth and ninth paragraphs of appellant's answer to the complaint; (3) the overruling of the demurrer of appellant to the second paragraph of reply of appellees to each of the fourth, fifth, and sixth paragraphs of appellant's answer; (4) overruling the motion of appellant for judgment on the answers of the jury to the interrogatories notwithstanding the general verdict; (5) overruling the motion for a new trial; and also (6) in arrest of judgment. The second, third and sixth assignments are waived by the failure of appellant to present any points or propositions relating thereto.

The complaint, in substance, alleges that on January 3, 1913, Lytel Bair owned a frame dwelling house in Summitville, Indiana, and on that day for a cash premium of \$7.50, appellant insured the same for \$600 for three years from that date; that appellee duly performed all the conditions of the policy of insurance so issued to him, and on the night of August 29, 1913, said building was totally destroyed by fire; that at the time of the fire the building was owned by said Bair and

was of the value of \$700, and his loss occasioned by the fire was \$700; that within four days after the fire appellee Bair notified appellant of the fire, and within fifteen days from the date of the fire appellant sent an adjuster to Summitville, who investigated and inspected the loss; that on October 7, 1913, appellee Lytel Bair furnished appellant due proof of the loss of said building; that on January 27, 1913, said appellee by a single mortgage encumbered real estate on which said building was located to secure indebtedness as follows: To George Bair, \$140; Pearl McLeod, \$14.30; James L. Noble, \$50; Summitville Bank \$100; James F. Sparks, \$22.07; Alfred Ellison, \$20; William Kittinger, \$25; Warner and Sons, \$18.75; Vinson and Potts, \$—; that appellant was duly notified of the giving of said mortgage immediately after its execution and assented thereto and then agreed with appellee Lytel Bair to cause said policy to be made payable to said mortgagees as their interests might appear; that appellant failed to make the necessary indorsement on the policy; that the appellees, other than Lytel Bair, join in the action that their interest in said policy may be protected by the court; that each has an interest therein to the amount of the respective claims above set out; that there is due on said policy the sum of \$600, and no part of same has been paid by appellant. The prayer is for judgment for \$700.

The policy was made a part of the complaint by exhibit, and, among other terms, provided that:

if the property "be or become mortgaged or encumbered, or if the interest of the assured be other than unconditional or sole ownership, or if the policy be assigned, or if the risk be increased by any means within the knowledge of the assured, then in each and every one of the above cases this entire policy shall be null and void unless otherwise provided by agreement endorsed herein.

"No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject to agreement endorsed hereon or added hereto and as to such provision and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provision or condition unless such waiver, if any, shall be written upon or attached hereto."

The policy further provided that in case of loss the assured should within fifteen days give notice in writing to the company, and within sixty days after loss should render a statement to the company, signed and sworn to by the assured, "stating the interest of the assured and all others in the property, the cash value of each item thereof and the amount of loss thereon, all other insurance, whether valid or not, covering any part of said property, and shall furnish an itemized statement of loss and damage to any building described in the policy; * * * .

The policy further stipulated that to secure mortgages, if desired, the policy should be made payable on its face to such mortgagee, as follows: Loss, if any, payable to John Doe, mortgagee."

The memorandum accompanying the demurrer states that the complaint does not show that the plaintiffs other than Lytel Bair have any interest in the insurance contract and that a joint action cannot be maintained; that none of the plaintiffs are shown to have an insurable interest in the property covered by the policy; that it is not shown that any amount is due any of the plaintiffs on the policy; that it does not appear that any of the plaintiffs have furnished the proof of loss required by the policy and by the laws of the state; that it affirmatively appears that Lytel Bair has himself breached the contract sued upon.

Under our Code, all who join as plaintiffs must have an interest in the subject of the action and be united in such interest, but their interests need not be

2. equal, and may be severable, provided all have some common interest in the subject-matter of the suit and each is interested in seeing that all who join as plaintiffs obtain relief in respect to such subject-matter.

This rule has been specifically applied in cases involving loss by fire where the owner of the property insured and the holder of encumbrance thereon joined in a suit upon the policy against the insurance company, it appearing that the total loss exceeded the amount of the encumbrance. §§251, 263 Burns 1914, §§251, 262 R. S. 1881; *Home Ins. Co. v. Gilman* (1887), 112 Ind. 7, 9, 13 N. E. 118; *Franklin Ins. Co. v. Wolff* (1899), 23 Ind. App. 549, 551, 54 N. E. 772; *Troxel v. Thomas* (1900), 155 Ind. 519, 522, 58 N. E. 725; *Judy v. Jester* (1912), 53 Ind. App. 74, 85, 100 N. E. 15.

It is contended by appellant that the complaint shows upon its face a breach of the insurance contract by the execution of the mortgage by appellee Lytel Bair to his coappellees, and that the averments which show a request to have the policy made payable to the mortgagees as their interests may appear and the failure of appellant to comply with such request, fall short of showing any right of action in appellees; that, if there is any liability, before a recovery can be had there must be a reformation of the contract to make the policy payable to the mortgagees as their interests may appear; that the terms of the policy require the interest of the mortgagees to be shown upon the policy itself.

Where the facts pleaded show a cause of action and also a defense thereto, the complaint is insufficient unless it also contain other averments which avoid

3. such defense. *Mallow v. Eastes* (1912), 179 Ind. 267, 270, 100 N. E. 836; *Johnson v. Harrison* (1911), 177 Ind. 240, 248, 97 N. E. 930, 39 L. R. A. (N. S.) 1207. The averments which show the execution of the mortgage and the failure to have the interest of the mortgagees shown upon the policy defeat any recovery thereon, unless avoided by the averments which show notice to appellant of the execution of the mortgage, its assent thereto and its agreement to have the policy made payable to the mortgagees as their interests appear, without actually so indorsing the policy. The averments are sufficient to show notice to appellant of the execution of the mortgage and an agreement with appellee Lytel Bair to properly indorse the interests of the mortgagees upon the policy, and a failure to comply with such agreement.

Under our Code we have but "one form of action for the enforcement or protection of private rights and the redress of private wrongs." Equitable prin-

4. ciples may be invoked to relieve against a wrong where the facts are sufficient to warrant the application of such principles. The averments of the complaint show that appellee Bair did everything necessary on his part to have the policy made payable to the mortgagees as their interests should appear, and that appellant agreed to so endorse the policy and failed to carry out its agreement. The failure to have the interests of the mortgagees duly endorsed on the policy was under the averments due to the fault of appellant. In such situation the principle may be invoked that equity regards that as done which in good conscience ought to have been done. *Sourwine v. Supreme Lodge, etc.* (1894), 12 Ind. App. 447, 450, 40 N. E. 646, 54 Am. St. 532; *Modern Brotherhood v. Matkovitch* (1913), 56 Ind. App. 8, 15, 104 N. E. 795, and cases cited. *Isgrigg v. Schooley* (1890), 125 Ind. 94, 99, 25 N. E. 151; *Ken-*

tucky, etc., Ins. Co. v. Jenks (1854), 5 Ind. 96, 104; *Stewart v. Gwynn* (1907), 41 Ind. App. 320, 325, 82 N. E. 1000, 83 N. E. 753; *Randall v. White* (1882), 84 Ind. 509, 514; *German-American Ins. Co. v. Sanders* (1896), 17 Ind. App. 134, 138, 46 N. E. 535; 1 Pomeroy, *Equity Jurisp.* (3d ed.) §§108, 109, 111, 364, 365.

In *Sourwine v. Supreme Lodge, etc., supra*, this court considered a case in which a member of the endowment rank of the K. of P. lodge complied with all of the conditions under which he was entitled to transfer to the fourth class, which paid a larger indemnity than the class from which he sought to transfer. He took this action in March, 1889, and died on May 5, 1892, without having obtained the transfer. His beneficiaries brought suit to recover on the ground that the insured was equitably a member of the fourth class, but the trial court sustained a demurrer to the complaint on the theory that he was not actually a member of such class at the time of his death. The court by Gavin, J., said: "Clearly, Croasdale possessed all the necessary qualifications, complied strictly with the requirements of appellee's constitution, and was in fact entitled to be, and under the allegations of the pleadings, ought to have been, transferred. Appellee's position is that nevertheless he was not transferred in fact, and could not be without the approval of the medical examiner in chief, and for this reason his beneficiaries cannot recover. It is further contended that he had, by not asserting his legal right to the transfer and not tendering the dues, acquiesced and abandoned his right to the transfer. The constitution and by-laws of such an organization are elements of the contract of insurance. * * * Under the averments, the action of the medical examiner in chief, in rejecting the application solely by reason of Croasdale's age, was in direct violation of the constitution. * * * Having done everything

that was to be done by him to effectuate the transfer, and being in all things entitled to it, it did not rest in the discretion of the examiner to refuse him. * * * Here is a manifest wrong. Yet it is asserted that although there was a wrong there is now no remedy. To so hold would be, to use a favorite phrase of Judge Elliott's, a reproach to the law. The arm of the law has not been so shortened as to leave the appellants remediless. If the application of the stricter rules of law, as formerly administered, do not furnish the remedy, the more expansive and beneficent principles of equity are ample for the purpose. An eminent law writer speaks thus: 'Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application, the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all parties.' 1 Pom. Eq. section 109. Again he says, at section 111: 'It has, therefore, never placed any limit to the remedies which it can grant; either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed. * * * So equity will grant relief here, although Croasdale never in his lifetime compelled the transfer, by mandate, as he might have done. We do not think it lies in appellee's mouth to complain that some hardship may be imposed on it by reason of his

failure to insist on his rights in a court of law before his death. For whatever hardship may arise therefrom, appellee, and not he, is responsible. * * *

"Our conclusion, therefore, is that the trial court erred in sustaining the demurrer to the complaint."

In *Modern Brotherhood v. Matkovitch*, *supra*, this court held that there could be a recovery by an intended beneficiary where there had been an ineffectual effort to have such person named as the beneficiary in the certificate and such change had been prevented by the wrong of the beneficiary named in the certificate.

Our Supreme Court, in *Isgrigg v. Schooley*, *supra*, made a similar holding, and on page 99 said: "The assured had the right to make the change; he did all that was within his power to do in compliance with the by-laws governing such change; the appellee, the beneficiary named in the original certificate, prevented him from a formal compliance in the delivery of the certificate, and equity will regard that as done, since he had the right to its possession, and the right to have delivered it, but could not do so by reason of the acts of the appellee, and equity requires no impossibilities."

We therefore conclude that the averments are sufficient to avoid the defense above indicated and to warrant the maintenance of the suit by appellees.

The averments show that the fire occurred on August 29, and that due proof thereof was furnished appellant on October 7, or thirty-nine days after the fire.

5. Both the statute (Acts 1911 p. 525, §4622g Burns 1914) and the provisions of the policy require proof of loss to be made within sixty days. As against the demurrer, these averments are sufficient to show that the requisite proof of loss was made within the specified time.

Under the foregoing authorities, the allegations show an insurable interest in the appellees and a cause

6. of action against appellant. We therefore conclude that the court did not err in overruling the demurrer to the complaint.

The eighth paragraph of answer sets up facts to show that after the policy in suit was written and before the loss by fire of the property insured, in a suit for divorce by the wife of appellee Lytel Bair, she obtained a money judgment against him which was an unsatisfied encumbrance on the property at the time of the fire; that appellant had no notice or knowledge thereof prior to January 5, 1914; that on or about January 6, 1914, appellant notified said appellee of its intention to rescind the contract of insurance, and then and there tendered him the amount of premium paid and interest thereon, in all the sum of \$10 in gold coin, lawful money of the United States which he refused to accept, and same was thereupon paid into court for his benefit.

The ninth paragraph of answer alleges that, after the execution of the policy in suit, the risk thereof was increased to the knowledge of appellee Lytel Bair, in violation of the terms of the policy, which provided that in such case the policy should be and become void, unless otherwise provided by agreement endorsed on the policy; that the risk was so increased by the execution of the mortgage mentioned in the complaint and by the rendition of judgments against appellant which became liens on the property insured, after the execution of the policy, and so remained at the time of the fire, all without appellant's knowledge or consent, and without consent or agreement thereto endorsed on the policy. The paragraph contains the same averments as the eighth, relating to when it obtained knowledge of the encumbrances and its notice of rescission and tender of the premium.

The Supreme Court of this state has held that a provision in a fire insurance policy that, "if the property

shall hereafter become mortgaged or encumbered, this policy shall be null and void," related to liens voluntarily placed on the property by the insured, and did not apply to judgments thereafter obtained against him or other liens created by law upon the property. *Phenix Ins. Co. v. Pickel* (1889), 119 Ind. 155, 162; 21 N. E. 546, 12 Am. St. 393. See, also, 2 Cooley, Briefs on Ins. 1768. *Baley v. Homestead Fire Ins. Co.* (1880), 80 N. Y. 21, 36 Am. Rep. 570; *Green v. Homestead Fire Ins. Co.* (1880), 82 N. Y. 517; *Lodge v. Capital Ins. Co.* (1894), 91 Iowa 103, 58 N. W. 1089.

What we have said in considering the complaint with reference to the allegations relating to the mortgage and the alleged consent thereto by appellant disposes of the allegations in the answer which count upon the mortgage.

Under the foregoing authorities, we hold that the court did not err in sustaining the demurrer to said paragraphs of answer.

The jury by their answers to interrogatories found that the policy in suit was issued on January 3, 1913, and that on January 27, 1913, appellee Lytel Bair executed a mortgage on the property to his coappellees; that the house insured was destroyed by fire on August 29, 1913, and the aforesaid mortgage was then in force; that neither appellant nor anyone in its behalf ever endorsed on the policy consent of appellant to the execution thereof; that Andrew F. Kaufmann was appellant's agent at Summitville at and subsequent to the time the policy was executed, and his authority as such was in writing and provided that he had power "to effect insurance upon property located within the limits or in the vicinity of said city, to countersign, issue and renew policies of insurance when assigned by the officers of the company and to consent in writing to assignments and transfers thereof and to collect

premiums for transmission to the company. The power hereby conferred is subject to the rules and regulations of said company, and to such instructions as may from time to time be given by its authorized representatives"; that the policy in suit was issued by appellant, at Summitville, Indiana, by its agent, Andrew F. Kaufmann; that on or about January 28, 1913, Lytel Bair had a conversation with said Kaufmann, in which he informed him of the execution of said mortgage on the property covered by the policy in suit and told him when it was executed but did not state the names of the mortgagees; that in said conversation said Bair asked Kaufmann to agree for appellant that the policy should not be null and void because of the mortgage and requested him for appellant to attach a loss-paying clause to said policy, showing same payable to the mortgagees as their interest shall appear; that said Kaufmann replied thereto, "Yes, all right"; that no loss-paying clause was ever attached to the policy; that on October 9, 1913, proof of loss was sent to appellant by United States mail to the city of New York, and such proof was furnished said Kaufmann who was appellant's agent in Summitville, Indiana, and had an office there all of the year 1913; that such proof was also furnished appellant at its main office in Indiana, in charge of A. J. Dillon at Rochester; that such proof of loss is as follows:

"To Continental Insurance Company, New York City.

"You Are Hereby Notified, That on the night of August 29, 1913, the dwelling house situated in Summitville, Madison County, Indiana and covered by an insurance policy issued by you, said policy being no. D 7320, in the amount of (\$600) six hundred dollars, was totally destroyed by fire; that at the time of said fire, the undersigned, Lytel Bair, was the owner of said house in fee simple, and was the owner of the real estate upon which the same

was situated, that the same was encumbered by the following mortgages;

Mortgage to Warner & Sons, in sum of \$18.75;

Mortgage to George Bair, in sum of \$140;

Mortgage to Pearl McLeod in sum of \$14.30;

Mortgage to James L. Noble in sum of \$50;

Mortgage to Summitville Bank, of Summitville, Indiana, in sum of \$100;

Mortgage to James F. Sparks, in sum of \$22.07;

Mortgage to W. A. Kittinger, in sum of \$25;

Mortgage to Alfred Ellison, in sum of \$20.

That said building, at the time of said fire, was fairly and reasonably worth seven hundred dollars (\$700.00) and the assured lost by reason of said fire the sum and amount of seven hundred dollars, (\$700.00).

"And the said Lytel Bair, being duly sworn, upon his oath, says that the above and foregoing is true.

"Lytel Bair.

"Subscribed and sworn to."

That no other or different proof of loss or written communications or documents were furnished appellant by appellee; that on October 11, 1913, appellant by registered mail sent to said Bair a letter which was received by his duly authorized attorneys at Anderson, Indiana, on October 13, 1913, and in substance stated that the proofs of loss had been received and were rejected because of: (1) Failure to furnish a detailed schedule of claim; (2) failure to state if any other person had any interest in the property; (3) failure to state knowledge and belief as to time and origin of the fire; (4) the fact that without the knowledge or consent of appellant encumbrances had been placed on the property insured.

The finding also shows that this action was begun on October 14, 1913, and appellant did not prior thereto deny any liability for the loss; that appellant promised to pay money due on the policy to persons other than appellee Lytel Bair, viz., to the mortgagees; that on November 6, 1913, appellant notified appellee Lytel Bair

of its rescission of the policy sued on because he had violated its provisions by encumbering the property, and tendered him ten dollars in gold coin.

Appellant urges two principal contentions to show that the answers to the interrogatories are in irreconcilable conflict with the general verdict and entitle it to judgment thereon, viz.: (1) Failure to furnish the requisite proof of loss; and (2) the mortgaging of the property without appellant's consent duly indorsed on the policy.

The first proposition is based upon the provisions of the policy and the statute. Acts 1911 p. 525, *supra*. Where the policy provides for preliminary proofs of loss, the statute requires the insured to furnish such proof within sixty days, and further provides that: "If for any reason the insurance company shall claim that such preliminary proof of loss is defective, it shall within ten days after the receipt thereof, notify in writing the insured * * * of the defects claimed, specifically stating them." The statute then requires the defects pointed out to be remedied by verified amendments, "complying with such objections as far as practicable, within ten days * * * or if unable to comply with such objections, the insured or the party making such proof of loss shall present to the company an affidavit to that effect, stating therein why such objections cannot be complied with."

The answers show that proof of loss was made and objections thereto by the company returned within the time prescribed by the statute, and that no further proofs or documents were furnished by appellee, but the answers also show that shortly thereafter appellant gave notice of its decision to rescind the policy and tendered back the full amount of the premium paid with interest. The company thus forcibly expressed

its denial of all liability based upon the alleged right to rescind the contract *in toto*.

In passing on the motion for judgment on the answers to the interrogatories we can only consider the general verdict, the questions and answers, and

8. the issues formed by the pleadings. Every reasonable presumption is indulged in favor of the general verdict, and the answers will not over-
9. come it if the verdict can be sustained by any facts provable under the issues. While the answers show that the notice of rescission and ten-
10. der of the premium were not made until ten days had expired after the receipt of appellant's objections to the proofs of loss, yet evidence was admissible to show that the proofs submitted were full and complete and could not be made more definite and specific; that before the expiration of the ten days following appellee's receipt of the objections to the proofs of loss, and before service of the formal notice of rescission, appellant denied all liability under the policy and so informed appellee Bair, and likewise informed him that its position on the question of liability could not be changed by any modification of the proofs, or by any affidavit or statement made in relation thereto.

The law does not require the doing of a useless and unnecessary thing, and under such conditions any further proofs or statements from appellee would not have changed the attitude of the parties to this suit on the ultimate question of appellant's liability. Furthermore, we find no provision in the policy or the statute requiring the insured to state his knowledge and belief as to the time and origin of the fire.

The proofs furnished show that the house was totally destroyed by fire on August 29, 1913, and that the loss amounted to \$700; that Lytel Bair at that time

11. owned the property in fee simple; that the same

was encumbered by a mortgage and the name of each mortgagee and the amount of his claim is set out. In our judgment the proofs submitted furnished a "detailed schedule of the claim," stated the character and extent of the interest claimed in the property by other parties, gave full information as to the encumbrance on the property, and substantially complied with the terms of the policy and the requirements of the statute.

The statute contemplates a good-faith claim that

12. the preliminary proofs are defective and a definite statement of the omitted facts in the notice of the defects in such proof, "specifically stating them." The objections pointed out do not meet the requirements.

On the facts of this case the failure to submit an affidavit showing that the proofs could not be made more specific, within ten days from the receipt of the

13. objections above shown, was the omission of only a technical detail, since the proofs furnished, when fairly construed, supplied all the information called for, and were not subject to the alleged objections pointed out by appellant. *Ohio Farmers Ins. Co. v. Glaze* (1913), 55 Ind. App. 147, 152, 101 N. E. 734.

The second objection relating to the encumbrance of the property without procuring the written consent of appellant thereto, indorsed upon the policy, presents a more serious and substantial question. In passing on the sufficiency of the complaint we have held the allegations showing notice to appellant of the execution of the mortgage and an agreement by it to properly indorse the policy payable to the mortgagees as their interests should appear, were sufficient to show liability, notwithstanding the policy was not actually so indorsed.

The answers to the interrogatories present the further question as to whether appellant is bound by notice

to, and agreement by, its local agent in respect
14. to the mortgage placed on the property. The written authority of appellant's local agent who procured the insurance does not specifically authorize him to indorse policies to show the interest therein of mortgagees, nor does it specifically deny his power so to do. He is given express authority to effect insurance, to countersign, issue, and renew policies, to consent in writing to their assignment and transfer, and to collect premiums.

The finding of facts also shows that the policy in suit was issued by appellant at Summitville, by its local agent, Andrew F. Kaufmann, who had an office there during all of the year 1913. Appellant contends that the power of the agent is governed by his written authority issued to him by the company; that as such agent he had no power to waive any provision of the policy and in no event could appellant be bound by any waiver of conditions not in writing and duly indorsed on the policy. Appellee, in effect, contends that as local agent of appellant with authority "*to countersign, issue and renew policies, * * * to consent in writing to assignments and transfers thereof and to collect premiums,*" under the laws of this state, Kaufmann, the local agent at Summitville, was the agent of appellant in the transactions relating to the policy in suit and within such limitations his acts and omissions relating thereto were the acts and omissions of appellant and binding upon it; that, in addition to the express authority given Kaufmann, by permitting him to issue policies, collect premiums, and maintain an office to transact the business of the company at Summitville, the company thereby held such agent out to the public and to appellees as having authority to bind it in all matters appertaining to the issuance, assignment, transfer, and indorsement of the insurance policies is-

sued by him from such office, and therefore cannot now be heard to deny his authority in respect to the policy in suit.

While the assignment of a policy is not in all respects identical with its endorsement in favor of a mortgagee, nevertheless the authorization of payment to a

15. mortgagee, is a conditional assignment or transfer to the mortgagee of an interest in the policy.

The conditions being that if a loss shall accrue

14. under the policy for which the insurer is liable and at such time the mortgagee shall have an interest in the property so insured, payment will be made to him in accordance with such interest.

We have already held that the mortgagee has such an interest as to make him a necessary party to the suit, and a proper party plaintiff. But it has also been held that where the interest of the mortgagee exceeds the amount of the loss, the mortgagee may maintain the suit in his own name and make the owner of the property a party defendant to the suit. *Franklin Ins. Co. v. Wolff, supra.*

It is not denied that the agent is given authority to consent in writing to the assignment of a policy and the transfer of all the interest of the insured to a purchaser. Such being the case, it is but reasonable to suppose that the parties intended to cover instances of partial and conditional assignments of the interest of the insured.

The instrument of authority is to be liberally and fairly construed, and a narrow and limited meaning is not to be given to it, unless the language em-

16. ployed clearly indicates that such was the intention of the parties. The words "assignments" and "transfers" are both employed. If the word

14. "transfers" has any effect, it is to broaden and enlarge the scope of the agent's authority be-

• yond what it would have been had only the word "assignments" been used. Appellant is here contending for the narrow construction against a third party dealing with a person whom it concedes to be its agent, with full authority to consent to an assignment of the policy, but who it asserts is devoid of authority to protect the interest of mortgagees by proper indorsement on the policy. The transactions are similar in many respects, and there seems to be no good reason for denying the authority in the one instance and conceding it in the other, since the language when fairly construed is broad enough to give authority to the agent in either instance. The words employed are not restricted in their meaning or application, and we are therefore free to give them a fair and reasonable construction, and in so doing should consider the relation of the parties and the nature and character of the business to be transacted by the agent. When so considered, the written authority is clearly sufficient to constitute the local agent of appellant its agent in the transactions relating to the mortgaging of the property insured. We therefore hold that appellant's local agent at Summitville had authority to consent to the mortgaging of the property insured, and to indorse the consent of appellant thereto upon the policy; that his agreement so to do and his failure to comply therewith are binding on appellant. As bearing on the several preliminary propositions, as well as upon the ultimate conclusion reached, we cite the following: *Cooley*, Briefs on Ins. 1063-1070; *Franklin Ins. Co. v. Wolff*, *supra*; *Continental Ins. Co. v. Munnes* (1889), 120 Ind. 30, 32, 22 N. E. 78, 5 L. R. A. 430; *Havens v. Home Ins. Co.* (1887), 111 Ind. 90, 93, 12 N. E. 137, 60 Am. Rep. 689; *German Fire Ins. Co. v. Greenwald* (1912), 51 Ind. App. 469, 472, 99 N. E. 1011; *Western Ins. Co. v. Ashby* (1913), 53 Ind. App. 518, 523, 102 N. E. 45; *Humboldt Fire Ins. Co.*

v. *Ashby* (1914), 57 Ind. App. 682, 687, 108 N. E. 150; *Thompson v. Michigan, etc., Ins. Co.* (1914), 56 Ind. App. 502, 509, 105 N. E. 780; *Metropolitan Life Ins. Co. v. Johnson* (1911), 49 Ind. App. 233, 244, 94 N. E. 785; *Indiana Ins. Co. v. Hartwell* (1890), 123 Ind. 177, 192, 193, 24 N. E. 100; 22 Cyc 1429-1432; 2 C. J. 434, 435, 438, 445.

The stipulation in the policy that none of its provisions can be waived by an agent except by consent of the company indorsed on the policy may itself

17. be waived either by express agreement or by conduct. *Metropolitan Life Ins. Co. v. Johnson, supra.* *Hanover Fire Ins. Co. v. Dole* (1898), 20 Ind. App. 333, 338, 50 N. E. 772; *Union, etc., Ins. Co. v. Whetzel* (1902), 29 Ind. App. 658, 665, 65 N. E. 15; *Commercial Union Assurance Co. v. State, ex rel.* (1888), 113 Ind. 331, 335, 15 N. E. 518; *Northern Assurance Co. v. Carpenter* (1912), 52 Ind. App. 432, 439, 94 N. E. 779; *West v. Nat. Casualty Co.* (1915), 61 Ind. App. 479, 112 N. E. 115.

The finding of facts shows that appellant, through its authorized agent, obtained knowledge of the mortgage and agreed to place on the policy the requisite

18. clause to make it payable to the mortgagees, on January 28, 1913. The loss occurred on August 29, 1913, but the policy was not at any time so indorsed. On these facts the company must be held to have waived the condition requiring its consent to be indicated in writing upon the policy.

Having concluded that the agent had express authority in the matters relating to the mortgage upon the property covered by the policy in suit, it is unnecessary for us to discuss the question of his implied authority.

From the foregoing we conclude that the answers to the interrogatories are not in irreconcilable conflict with

the general verdict, and that the court did not err in overruling the motion for judgment on such answers.

Most of the questions discussed under appellant's motion for a new trial have in effect been disposed of by our decision of the questions relating to the pleadings and the interrogatories. We shall only specifically refer to those which have not been so disposed of.

The complaint shows that the only interest the appellees, other than Lytel Bair, have in the property is given them by the mortgage, and they ask only that such interest be protected out of the amount that may be found due on the policy. The protection of such interests could not change the liability of appellant nor increase the total amount, if any, due on the policy.

On the part of appellees the case was tried on the theory of a total loss, and that the value of the property destroyed by the fire exceeded the amount of the policy. On behalf of appellant the case was defended on the ground that it was not liable for any part of the loss for numerous reasons, principally because of the execution of the mortgage on the property without procuring its consent in writing on the policy; failure to make due proof of loss, and on the theory that appellee Lytel Bair had himself caused the property to be burned. We have read the evidence and find it conflicting on some of the controverted propositions, but there is no failure of proof to sustain every material element of appellees' case.

It is not essential that facts be established by direct and positive testimony, and it is sufficient on appeal if from the facts and circumstances proved the

19. jury may reasonably have inferred the ultimate and essential facts necessary to sustain the verdict. *Bronnenberg v. Indiana Union Traction Co.* (1915), 59 Ind. App. 495, 498, 109 N. E. 784; *Evans-*

ville Metal Bed Co. v. Loge (1908), 42 Ind. App. 461, 468, 85 N. E. 979.

The policy in suit was written by the local agent without any formal or written application, and the evidence shows that by special arrangements be-

20. tween him and Lytel Bair the policy was kept in the agent's office and was not seen by Bair until after the fire occurred. Insurance contracts, and more especially those executed under such circumstances, are not construed with the same strictness that generally obtains in the interpretation of written instruments where the parties stand upon the same level and have like opportunity to be advised as to all the provisions of the instrument. Where the premium has been

21. paid and the risk has attached, every presumption will be indulged in favor of the good faith of the parties to uphold the contract made by them and to avoid a forfeiture. *Northern Assurance Co. v. Carpenter, supra*, and cases cited; *Glens Falls Ins. Co. v. Michael* (1906), 167 Ind. 659, 667, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; *Iowa Life Ins. Co. v. Haughton* (1910), 46 Ind. App. 467, 477, 87 N. E. 702.

One of appellant's witnesses on cross-examination testified to facts and circumstances which tended to contradict and weaken his testimony in chief.

22. With no other foundation for so doing, appellant sought to prove by other witnesses that such witness had made statements out of court similar to his testimony in chief, shortly after the fire occurred, and the testimony was excluded on the objection of appellees that no foundation had been laid which warranted such corroborating testimony. Where a witness has been impeached by the testimony of another witness, tending to show that he has made statements out of court inconsistent with his testimony in court, it is

proper to corroborate such witness by proving that he had also made previous statements in harmony with his testimony at the trial. But the rule has not been extended to permit such corroborating testimony to support or bolster up the testimony of such witness in chief on the ground that his evidence on cross-examination tends to contradict or weaken his testimony in chief. *Hobbs v. State* (1893), 133 Ind. 404, 407, 32 N. E. 1019, 18 L. R. A. 774; *Hodges v. Bales* (1885), 102 Ind. 494, 500, 1 N. E. 692; *Hopkins v. State* (1913), 180 Ind. 293, 294, 102 N. E. 851.

We have examined the instructions and find no reversible error in the giving or refusal of them. Some

of those given are not entirely accurate under
23. our view of the law of this case on the subject
of the authority of the local agent, but appellant was not harmed thereby, for under the views already announced in regard to the express written authority of the local agent, the court should have told the jury that he was thereby empowered to act for the company in consenting to the mortgage on the property and the proper indorsement of the policy, and that his acts and omissions in relation to the policy in suit and such mortgage were within the scope of his agency and binding on appellant. The instructions should be considered together, and when so read, they fairly and accurately state the law of the case. .

We have considered and decided the controlling questions presented, and do not feel warranted in extending this already too lengthy opinion to further discuss minor technical questions, the rulings upon which, in our view of the paramount questions already decided, could not have deprived appellant of any substantial right, nor been influential in the determination of the legal controversy or the questions of fact submitted to and decided by the jury. Judgment affirmed.

Ibach, P. J., Dausman, Caldwell, Batman and Hottel, JJ., concur.

ON PETITION FOR REHEARING.

FELT, J.—Several propositions are urged by appellant in support of its petition for a rehearing. In our view of the case all of these propositions are disposed of by the original opinion, either expressly or by necessary implication from the language employed and the authorities cited.

Appellant earnestly insists that the court has either failed to comprehend its position, or has by oversight applied principles that have no application to the controlling questions of this case. This contention is especially urged as to the court's view of the authority of appellant's local agent and the waiver by him of the provision requiring any waiver affecting the policy to be indorsed thereon in writing in order to bind the company. It is insisted that the mortgaging of the property after the policy was issued rendered it void and relieved appellant from all liability thereon; that no conduct or promise of the local agent respecting the indorsement of the consent of the company in writing on the policy could waive such requirement and have the effect of making appellant liable for the loss occasioned thereafter by the destruction of the property by fire.

It is contended that in the cases cited by the court the insured had a right which was affected by the conduct of the company or its authorized agent, and that in this case the insured had no right to mortgage the property without the consent of the company, and that by doing so without procuring such consent duly indorsed on the policy the same was rendered void; that there-

after the company might "as a matter of grace or favor waive this breach," but the insured could not claim that he had any right to the consent of the company to the mortgaging of the property or to have such consent indorsed on the policy in writing.

This view of the questions involved overlooks several important propositions clearly set forth in the opinion, viz.: (1) The local agent had express written authority to act for the company in giving consent to the mortgaging of property insured through his agency, and to make the necessary indorsement on the policies to evidence such consent and transfer of interest to the mortgagees. (2) The local agent gave such consent and promised to make the requisite indorsement on the policy to comply with the provisions thereof. (3) At the time such consent was given in January, the policy was in the possession and under the control of the local agent and so remained until after the fire occurred in August following.

In giving consent and promising to indorse the policy as requested by the insured, the local agent acted within the scope of his agency. His knowledge,

14. his promise, and his failure relating to the mortgage on the property are all imputable to and binding upon the company. After giving consent and promising to indorse the same upon the policy then in the possession of its duly authorized agent, as above indicated, it became a matter of contract, obligating appellant to execute its agreement, and was no longer "a matter of grace or favor," to be bestowed or withheld at its pleasure. According to appellant's own statement, if this view is correct, the case is controlled by the principles announced and the authorities cited in the original opinion.

As supporting the views we have announced we refer to the case of *Havens v. Home Ins. Co.* (1887), 111 Ind.

90, 92, 12 N. E. 137, 138, 60 Am. Rep. 689, wherein our Supreme Court, by Mitchell, J., said: "Insurance policies are prepared by the companies, and contracts of insurance are usually consummated by experts on the one hand, and inexperts on the other. The policy of the law is, therefore, to give them such an interpretation as to prevent a forfeiture whenever upon principles of fair construction such a result is possible. It is abundantly settled that, notwithstanding conditions in the policy, if at the time the insurance was effected, or afterwards, there were conditions, uses or incidents of the risk which were in conflict with conditions in the policy, and which were known to the insurer, or its agent, whose knowledge is imputable to the company, such conditions, uses, or incidents cannot be used to defeat a recovery after a loss has occurred. Issuing or continuing a policy of insurance, with full knowledge by the company of existing facts, which, according to a condition of the contract, make it voidable, is a waiver of the condition. If it were otherwise, the company would be enabled to perpetrate a fraud upon the assured. *Home Ins. Co. v. Duke*, 84 Ind. 253; *Aetna Ins. Co. v. Shryer*, 85 Ind. 362; *Excelsior, etc., Ass'n v. Riddle*, 91 Ind. 84; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270."

The provisions of the policy rendering it void if the property insured should be encumbered without the written consent of the company indorsed thereon,

24. and that no agent has authority to waive any condition of the policy except as therein stipulated, and that no waiver is binding on the company unless written upon, or attached to, the policy, are all stipulations in favor of the company, which it could waive by express agreement or by conduct, and which in the case at bar, as it comes to this court must be held to have been waived by the promise, failure, and

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25. conduct of appellant's authorized agent, acting within the scope of his agency, or as sometimes expressed by the courts, appellant is thereby estopped to deny such waiver. *Insurance Co. v. Norton* (1877), 96 U. S. 234, 24 L. Ed. 689; *Havens v. Home Ins. Co.*, *supra*, 93, 95; *Sweetser v. Odd Fellows, etc., Assn.* (1889), 117 Ind. 97, 100, 19 N. E. 722; *Phenix Ins. Co. v. Tomlinson* (1890), 125 Ind. 84, 86, 25 N. E. 126, 9 L. R. A. 317, 21 Am. St. 203; *Union, etc., Ins. Co. v. Whetzel* (1902), 29 Ind. App. 658, 666, 65 N. E. 15, and cases cited.

\ The petition for a rehearing is overruled.

NOTE.—Reported in 114 N. E. 763, 116 N. E. 752. Insurance: waiver of stipulation in policy that conditions can be waived, only by writing issuing from the insurer, 107 Am. St. 99, 100, 19 Cyc 777, 778.

INGRAM v. JEFFERSONVILLE, NEW ALBANY AND SELERSBURG RAPID TRANSIT COMPANY ET AL.

[No. 9,292. Filed May 8, 1917. Rehearing denied November 2, 1917.]

1. **DEEDS.**—*Foreign Deeds.*—*Sufficiency.*—A deed for real estate in Indiana executed in another state, though differing in form from that authorized by statute in this state, may nevertheless convey title. p. 537.
2. **ACKNOWLEDGMENT.**—*Deeds.*—*Sufficiency.*—*Certificate of Foreign Notary.*—A deed executed in another state conveying land in this state acknowledged by each of the grantors before a notary public with indications that a seal was attached and that the acknowledgment of the grantors' wives were taken out of the hearing and presence of their husbands sufficiently complied with §§476, 3965, 3982 Burns 1914, §§460, 2933, 2947 R. S. 1881, as to notary's certificates and acknowledgment of instruments, to entitle the instrument to be recorded, and such deed was admissible in evidence as against the objection that it was not properly acknowledged. p. 537.
3. **EVIDENCE.**—*Deeds.*—*Admissibility.*—In an action in trespass by one claiming ownership of certain lands, where a deed for

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the land to A was admitted in evidence, a later deed to plaintiff purporting to have been executed by the heirs of A and the trustee under his will shows sufficient connection between the grantee of the first deed and the grantors of the second to warrant the latter's admission in evidence as tending to show title in plaintiff. p. 538.

4. **TRESPASS.—Extent of Possession.—Evidence.—Deeds.**—In an action in trespass where plaintiff alleged that she was in possession of the land involved and that she was wrongfully excluded therefrom, a deed to plaintiff sufficient to give color of title authorized her to claim possession of all the land described therein, though actual possession may have extended only to a portion thereof, and such deed was admissible in evidence to show the extent and character of plaintiff's possession. p. 538.
5. **TRESPASS.—Damages.—Elements.**—Under a complaint alleging both title and possession of real estate in plaintiff, there may be a recovery of damages against a wrongdoer for trespass upon the realty resulting in injury thereto and an interference with the possessory rights of plaintiff therein. p. 538.
6. **TRESPASS.—Right to Sue.—Character of Possession.**—Rightful possession at the time of the trespass is sufficient to warrant an action therefor, though the party injured, because of the wrongful conduct of the trespasser or for other reasons, may be out of possession when the action is begun. p. 539.
7. **TRESPASS.—Complaint.—Issues.—Proof.**—In an action in trespass, under a complaint alleging ownership of land and possession at the time of the trespass, plaintiff is entitled to prove possession, the trespass and injury to the property interfering with the right of possession, and the damages sustained without first proving a record title to the realty involved. p. 539.
8. **TRESPASS.—Complaint.—Legal Title.—Proof.**—In an action in trespass, where plaintiff merely alleged that she held the legal title to the land involved, she was entitled to prove any pertinent facts tending to show legal title, which includes title by adverse possession, and it was error for the trial court to require that she show record title. p. 540.

From Floyd Circuit Court; *William H. Paynter*, Special Judge.

Action by Anna L. Ingram against the Jeffersonville, New Albany and Sellersburg Rapid Transit Company and others. From a judgment for defendants, the plaintiff appeals. *Reversed.*

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Stannard & Howard and Jewett, Bulleit & Jewett, for appellant.

George H. Voight and Stotsenberg & Weathers, for appellees.

FELT, C. J.—This is an action for damages for trespass upon real estate brought by appellant against the Jeffersonville, New Albany and Sellersburg Rapid Transit Company, the Southern Indiana Interurban Railway Company, and the Louisville and Southern Indiana Traction Company. The case was tried on an amended complaint in one paragraph and separate answers by each of the defendants which included the general denial; a plea of the statute of limitations; that the real estate had been duly appropriated by the Jeffersonville, New Albany and Sellersburg Rapid Transit Company; and that the real estate described in the complaint was a public highway. Appellant filed a reply in general denial to each of the special answers. At the close of plaintiff's evidence the court gave a peremptory instruction in favor of the defendants, and the jury returned a verdict in favor of each of the appellees. Appellant's motion for a new trial was overruled and judgment rendered on the verdict. The overruling of the motion for a new trial is the error assigned and relied on for reversal of the judgment.

The gist of the amended complaint is that on and prior to the time of the alleged trespass appellant "was the owner in fee simple and in possession of certain real estate" therein described, and that except as wrongfully excluded therefrom by appellees she is still the owner and in possession of said real estate. Facts are averred to show the incorporation of appellees and the successive transfer, ownership and operation of the line of road on or near the property of appellant de-

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scribed in the complaint. It is also averred that appellant never at any time gave any license to either of appellees, or to any one else, to construct and maintain said interurban railroad over and upon her real estate; that the Jeffersonville, New Albany and Sellersburg Rapid Transit Company, without any license from appellant, and without payment of damages therefor, wrongfully entered upon said real estate of appellant, took possession thereof, cut ditches, and built embankments thereon, and otherwise trespassed upon appellant's land to her damage; that a strip of appellant's land was taken by said company, which land so taken constituted the only way of ingress to and egress from appellant's lands adjoining to the land so wrongfully taken as aforesaid, and a private way of appellant was thereby entirely destroyed; that by the seizure and appropriation of appellant's land she has been entirely deprived of the use and enjoyment thereof; that the real estate so wrongfully taken was, when so taken, of the value of \$500, and the remainder of appellant's adjoining real estate has been damaged by the wrongful acts aforesaid in the sum of \$2,000; that by reason of the aforesaid trespass and all the wrongs and grievances alleged appellant has been damaged in the sum of \$3,000, for which amount she demands judgment.

The motion for a new trial contains thirty-eight alleged reasons, among them, that the verdict of the jury is not sustained by sufficient evidence; error in instructing the jury to find for the defendants, and numerous alleged errors in excluding evidence offered by appellant.

Appellant offered in evidence a certain deed of partition executed in October 1854, by and between three persons, by means of which certain real estate was conveyed to one Garnett Duncan, of which the land described in the amended complaint is a part. Appellant

then offered in evidence a deed to her for the land described in the complaint purporting to have been executed on September 7, 1889, by the heirs at law of said Garnett Duncan, deceased, viz., Kate B. Lewis and Thomas A. Lewis, her husband, Blanton Duncan and Mary Duncan, his wife, and Thomas A. Lewis and Blanton Duncan, trustees under the will of Garnett Duncan, deceased. Appellees objected on the ground that no connection had been shown between the grantors of the deed offered in evidence and the grantees in the deed already in evidence, and for the further reason that the deed was not executed and acknowledged as required by the laws of this state. The court sustained the objection and appellant excepted to the ruling.

Before offering the deed appellant proved by W. T. Ingram, her husband, that he procured the deed from Kate B. Lewis and others to appellant, Anna L. Ingram; that he knew Kate B. Lewis and she was the daughter of Blanton Duncan; that for five years prior to September 7, 1889, he had a lease on the real estate described in the deed; that he paid the rent therefor to Judge Jewett as attorney for Kate B. Lewis; that he purchased the real estate from Kate B. Lewis and others and had the title conveyed to his wife.

The deed excluded is set out in the record. An examination of it shows that it was executed in the state of California on September 7, 1889, by Thomas A. Lewis, trustee of Kate B. Lewis, and Kate B. Lewis and Thomas A. Lewis, her husband, and Blanton Duncan, trustee under the will of Garnett Duncan, and Blanton Duncan and Mary Duncan, his wife, "parties of the first part and Mrs. Anna L. Ingram, of Jeffersonville, Indiana, of the second part, witnesseth that the said first parties have sold and conveyed and by this deed do hereby sell and convey, with general warranty, to Mrs. Anna L. Ingram, for the sum of" \$2,178.75, certain real

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estate in Clark county, Indiana, particularly described, "being a part of the estate of Garnett Duncan, deceased." The instrument is acknowledged by each of the grantors before a notary public, with indication that a seal was attached, and that the acknowledgments of the wives were taken out of the hearing and presence of their husbands. The deed was recorded on September 27, 1889, in the recorder's office of Clark county, Indiana.

A deed executed in another state, though differing in form from that authorized by statute in this state, may nevertheless convey to the grantee the title

1. to real estate in this state. 13 Cyc 526; *Jackson v. Green* (1887), 112 Ind. 341, 14 N. E. 89; *Fisher v. Parry* (1879), 68 Ind. 465, 468.

The differences in the form of the deed offered in evidence and excluded by the court from our statutory form of conveyances do not in any material sense

2. change the effect of the instrument. The acknowledgments were not invalidated by the manner in which they were taken, or by the form of the certificate used by the notary. They were duly certified under the seal of the notary, and sufficiently complied with our statutes to entitle the instrument to be recorded in this state and to make it "presumptive evidence of the official character of such instrument and of the facts therein set forth." §476 Burns 1914, §460 R. S. 1881; §3965 Burns 1914, §2933 R. S. 1881; §3982 Burns 1914, §2947 R. S. 1881; *Winship v. Clendenning* (1865), 24 Ind. 439, 443; *Carver v. Carver* (1884), 97 Ind. 497, 509, 512; *Bryant v. Richardson* (1890), 126 Ind. 145, 154, 25 N. E. 807; *Westhafer v. Patterson* (1889), 120 Ind. 459, 461, 22 N. E. 414, 16 Am. St. 330; *Davar v. Cardwell* (1867), 27 Ind. 478; *Rowe v. Beckett* (1868), 30 Ind. 154, 161, 95 Am. Dec. 676.

As against the two objections urged by appellees, we

think the deed should have been admitted in evidence.

The facts show such connection between the

3. grantee, Garnett Duncan, of the deed admitted as evidence, and the grantors of the deed excluded, as to indicate *prima facie*, some title in such grantors of the deed to appellant. On such showing the deed should have been received as evidence tending to show title in appellant.

Furthermore, the averments of the complaint not only charge that appellant was the owner of the real estate on which the alleged trespass was committed,

4. but that she was *in the possession thereof* when the trespass was committed, and is still in such possession except as wrongfully excluded therefrom by appellees. Appellant offered to prove her possession by other competent evidence. Under the averments of her complaint the alleged trespass interfered with her possession and use of the entire tract conveyed by the deed. The deed was clearly sufficient to give color of title, and under it appellant was authorized to claim possession of all of the land described therein, though her actual possession may only have extended to a part of it. Aside from the question of proving title in appellant, the deed was admissible as tending to show the extent and character of appellant's possession. *Vancleave v. Milliken* (1859), 13 Ind. 105, 106; *Bennett v. Gaddis* (1881), 79 Ind. 347, 350; 1 R. C. L. 708, 727; *Pillow v. Roberts* (1851), 13 How. 472, 14 L. Ed. 228, 231; *Sumner v. Murphy* (1834), 2 Hill (S. C.) 488, 27 Am. Dec. 397, 401; *Hitt v. Carr* (1916), 62 Ind. App. 80, 109 N. E. 456, 465; *Wright v. Kleyla* (1885), 104 Ind. 223, 224, 4 N. E. 16.

The decisions of this state sustain the proposition that under a complaint alleging both title and possession of real estate in the plaintiff there may be

5. a recovery of damages against a wrongdoer for

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trespass upon such property resulting in an injury to the property and an interference with the possessory rights of such plaintiff therein. *Barber v. Barber* (1863), 21 Ind. 468, 470; *Catterlin v. Douglass* (1861), 17 Ind. 213; *Bristol Hydraulic Co. v. Boyer* (1879), 67 Ind. 236, 240; *Cleveland, etc., R. Co. v. Born* (1911), 49 Ind. App. 62, 65, 96 N. E. 777; *Schaeffer v. Rominger* (1901), 27 Ind. App. 409, 413, 61 N. E. 605; *Winship v. Clendenning, supra*; *Conner v. New Albany* (1820), 1 Blackf. 88, 90, and notes, 12 Am. Dec. 207; *Carney v. Reed* (1858), 11 Ind. 417; *Case v. Weber* (1850), 2 Ind. 108, 112; *Kellogg v. King* (1896), 114 Cal. 378, 383, 46 Pac. 166, 55 Am. St. 74; *Buck v. Louisville, etc., R. Co.* (1909), 159 Ala. 305, 48 South. 699; *Louisville, etc., R. Co. v. Higginbotham* (1907), 153 Ala. 334, 44 South. 872; *Stahl v. Grover* (1891), 80 Wis. 650, 50 N. W. 589; *Wilson v. Bibb* (1833), 1 Dana (Ky.) 7, 25 Am. Dec. 118; 38 Cyc 1004, 1005.

Rightful possession at the time of the trespass is sufficient to warrant the action, though the injured person, by the wrongful conduct of the trespasser or

6. for other reasons, may be out of possession when the action is begun. *Conner v. New Albany, supra*; *Buck v. Louisville, etc., R. Co., supra*; *Wilson v. Bibb, supra*; 38 Cyc 1005-1006.

Appellant offered to prove by William T. Ingram, a competent witness, her actual and exclusive possession of the real estate at the time of, and long prior

7. to, the alleged trespass; that appellees, without her consent or authority, took possession of a portion of the real estate described in her complaint, and constructed an electric railroad thereon in 1902 and 1903, and have continued to maintain and operate the same thereon; that no damages have ever been assessed or paid to her; that the land so taken by appellees was at the time enclosed and crops belonging to appellant

were growing thereon; that her crops and fences were removed and destroyed; that the portion of ground so taken was appellant's only means of ingress to and egress from her land adjacent to the part so taken by appellees; also facts tending to prove the amount of damages sustained by appellant. The gist of the numerous objections made and sustained by the court to the admission of evidence of the kind and character above indicated was that appellant's alleged cause of action was based solely upon a record title to the real estate upon which the alleged trespass was committed, and that until she showed such title she should not be allowed to prove possession of the real estate or any facts tending to show trespass upon or damages to the property described in the complaint. Appellant made proper offers of proof, but the court in each instance sustained the objection, and, as indicated by the objections and remarks of the court, did so on the theory that such proof was not proper until a record title was proved in appellant, and that she had not alleged in her complaint title by adverse possession. Under the authorities already cited, and the allegation of possession of the real estate by appellant at the time of the trespass, she was entitled to prove her possession, the trespass upon and injury to the property which interfered with her right of possession, use and enjoyment of the real estate, and the damages, if any, sustained by her by reason of such trespass.

Furthermore, the averments show that appellant held the legal title to the land described in the complaint, but it is not alleged that she held the record title.

8. The averment is general that she owned the fee, but such title may be acquired and held by a person who cannot show a record title. Under such averment appellant was entitled to prove any pertinent facts tending to show that she owned the legal title to the

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real estate. A title acquired and held by adverse possession is a legal title, and the averments are broad enough to admit proof of such title as well as proof of a record title. *Sims v. City of Frankfort* (1881), 79 Ind. 446, 449; *Jackson v. Creek* (1910), 47 Ind. App. 541, 554, 94 N. E. 416; *Rennert v. Shirk* (1904), 163 Ind. 542, 544, 72 N. E. 546; *Stout v. McPheeters* (1882), 84 Ind. 585, 589.

The trial court therefore erred in overruling appellant's motion for a new trial. The judgment is reversed, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 116 N. E. 12. Trespass: possession of plaintiff, sufficiency of, to maintain action, 72 Am. Dec. 123. See under (1) 13 Cyc 526; (6-8) 38 Cyc 1004.

GLOBE AND RUTGERS FIRE INSURANCE COMPANY v HAMILTON.

[No. 9,313. Filed June 21, 1917. Rehearing denied November 2, 1917.]

1. **APPEAL.—Briefs.—Waiver of Error.**—Assignments of error not presented in appellant's briefs are waived. p. 543.
2. **INSURANCE.—Fire Insurance.—Knowledge of Agent.—Imputation to Company.**—One who acts for an insurance company in procuring insurance, collecting premiums, inspecting risks, etc., is its agent, and his acts and knowledge relating to property insured at the time a policy is executed are imputed to the company. p. 545.
3. **CONTRACTS.—Written.—Construction.—Parol Evidence.—Admissibility.—Intent.**—Although parol evidence is not admissible to change or modify a contract in writing, such testimony may be admitted to enable the court to properly apply a written contract to the subject-matter, and, in case of ambiguity, to remove the uncertainty. p. 545.
4. **CONTRACTS.—Written.—Construction.—Parol Evidence.—Admissibility.—Ambiguity.**—Where the language employed in a contract is ambiguous or subject to variations in meaning depending upon circumstances and conditions, or the relation in

which it was used, parol testimony may be received to inform the court of the conditions out of which the contract arose, so that it may be enabled to more accurately ascertain the intent and meaning of the parties as evidenced by their contract. p. 546.

5. **CONTRACTS.—Written.—Construction.**—Such a construction of a written contract will be adopted, if possible, as will make it effectual to carry out the intention of the parties as gathered from the whole instrument. p. 546.
6. **INSURANCE.—Contract.—Construction.**—As insurance contracts are usually prepared by the insurer, the courts interpret them liberally in favor of the insured, so that the evident intention existing at the time the insurance was obtained may not be thwarted by a narrow or technical construction of the language employed. p. 546.
7. **INSURANCE.—Policy.—Construction.—“Addition.”**—The word “addition,” as applied to buildings, usually means a part added, or joined, to a main building, but in construing the term as used in insurance contracts, the use made of buildings more or less closely situated, their relative location, accessibility, and adaptability to some common end are factors which must be considered, and the designation “addition” may be applied to buildings appurtenant to some other building though not actually in physical contact therewith. p. 548.
8. **INSURANCE.—Fire Insurance.—Policy.—Construction.—Property Covered.—Addition.**—Where a fire policy insured household furniture “while contained in the one and one-half-story frame, with shingle roof, dwelling house and additions,” it covered furniture stored in an outbuilding situated on the rear of the lot and connected with the house by a cement walk, the word “additions,” as used in the policy, meaning any and all buildings on the premises used by the insured in maintaining his home by storing or using his furniture and household effects therein. p. 549.
9. **APPEAL.—Record.—Review.**—The court on appeal will not search the record to reverse a judgment, though it may do so to affirm. p. 549.
10. **APPEAL.—Briefs.—Questions Presented.**—Mere abstract propositions of law, stated under points and authorities in appellant’s brief, though correct in principle, are not sufficient to present reversible error. p. 549.

From Putnam Circuit Court; *James P. Hughes*, Judge.

Action by Fay S. Hamilton against the Globe and

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Rutgers Fire Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

William J. Henley, Harry A. Fenton and Jackiel W. Joseph, for appellant.

Silas A. Hays, Mat. J. Murphy and Fay S. Hamilton, for appellee.

FELT, J.—This is an action by appellee against appellant on a fire insurance policy. The complaint in one paragraph was answered by a general denial, and by a second paragraph of special answer, to which appellee filed a reply in two paragraphs. A trial by jury resulted in a general verdict for appellee in the sum of \$100.

With the general verdict the jury returned answers to certain interrogatories. The court overruled appellant's motion for judgment on the answers to

1. the interrogatories, and for a new trial, and rendered judgment on the general verdict, from which appellant appealed and has assigned errors as follows: (1) Overruling its motion to require appellee to make his complaint more specific; (2) overruling the demurrer to the complaint; (3) overruling appellant's demurrer to appellee's reply to appellant's second paragraph of answer; (4) overruling appellant's motion for judgment in its favor on the answers to the interrogatories; (5) overruling the motion for a new trial. By failing to present them in its brief, appellant has waived the first and second assignments.

Omitting formal averments, the complaint in substance charges that appellant, in consideration of \$4, insured appellee against loss or damage by fire to the amount of \$500 on household furniture, etc., "while contained in the one and one-half story frame, with shingle roof, dwelling house and additions, * * * situated at No. 6 Park street in the city of Greencastle, Ind.";

that on July 23, 1914, while said insurance was in full force and effect, plaintiff sustained a direct loss and damage by fire to said property in the sum of \$500. A copy of the policy is made part of the complaint by exhibit.

The second paragraph of answer alleges in substance that the property of plaintiff insured by defendant under the policy made a part of the complaint has not been burned, damaged, or destroyed by fire since the date of the execution of said policy, while contained in the dwelling therein described.

The second paragraph of reply to defendant's second paragraph of answer alleges in substance that the residence described in the policy issued to plaintiff, Hamilton, by defendant, consisted of a story and a half frame building and a one-story frame outbuilding appurtenant thereto and connected therewith by cement walk and a solid board fence; that plaintiff's household articles at and prior to the issuance of the aforesaid policy were located in and used by him in and about said residence, all of which facts were then and there known to the defendant company's agent, to whom plaintiff applied for said insurance; that said agent then and there intended such policy to include and represented to plaintiff that it did include and cover all of his household furniture and personal property located in said residence, including said outbuilding or addition appurtenant thereto; that plaintiff relied upon the statement and representations of the aforesaid agent, and accepted said policy and paid the premium required therefor; that defendant at all times knew plaintiff and its said agent understood that said policy included and covered plaintiff's said property in the aforesaid dwelling, including said outbuilding or addition appurtenant thereto and connected therewith; that plaintiff and said agent intended the description of said personal property in

said policy to cover and include the household goods of plaintiff while so located in said dwelling and addition or outbuilding aforesaid, and believed that such description did so include said personal property.

The policy in question was procured by appellee from one John W. Cooper, who was appellant's local agent at Greencastle, Indiana. He testified that he

2. was acquainted with the buildings of appellee, occupied by him as a home; that when appellee applied for insurance on his household goods he inspected the buildings and considered his household goods; that he prepared the policy by using a form supplied him by appellant's state agent; that he made and wrote in the policy the description of the property, collected the premium from appellee, and delivered to him the policy. A person so acting for an insurance company is its agent, and his acts and knowledge relating to the property insured at the time the policy was executed are imputed to the company. *Indiana Ins. Co. v. Hartwell* (1890), 123 Ind. 177, 192, 193, 24 N. E. 100; *Humboldt Fire Ins. Co. v. Ashby* (1914), 57 Ind. App. 682, 687, 108 N. E. 150; *Western Ins. Co. v. Ashby* (1913), 53 Ind. App. 518, 523, 102 N. E. 45; *German Fire Ins. Co. v. Greenwald* (1912), 51 Ind. App. 469, 472, 99 N. E. 1011.

Where a contract is in writing, parol evidence is not admissible to change or modify it, but such testimony may be admitted to enable the court to properly

3. apply the contract to the subject-matter, and, in case of ambiguity, to remove the uncertainty. This rule is invoked to enable the court to ascertain the facts and circumstances as they existed at the time the contract was entered into and to thereby place itself as nearly as possible in the position of the parties whose contract is to be interpreted. *Ransdel v. Moore*

(1899), 153 Ind. 393, 407, 53 N. E. 767, 53 L. R. A. 753; *Doney v. Laughlin* (1911), 50 Ind. App. 38, 45, 94 N. E. 1027; *Howard v. Adkins* (1906), 167 Ind. 184, 188, 78 N. E. 665.

Where the language employed is ambiguous or subject to variations in meaning depending upon circumstances and conditions, or the relation in which

4. it was used, parol testimony may be received to inform the court of the conditions out of which the contract arose, thereby enabling it to more accurately ascertain the intent and meaning of the parties as evidenced by their contract. *Driscoll v. Penrod* (1911), 176 Ind. 19, 23, 95 N. E. 313; *Reed v. Insurance Co.* (1877), 95 U. S. 23, 24 L. Ed. 348; *Warner v. Marshall* (1905), 166 Ind. 88, 114, 75 N. E. 582. The court will, if possible, adopt such construction of

5. a written contract as will make it effectual, rather than ineffectual, to carry out the intentions of the parties as gathered from the whole instrument. *Driscoll v. Penrod, supra.*

Insurance contracts are usually prepared by the insurer, and courts therefore give them a liberal interpretation in favor of the insured to the end that the

6. evident intention existing at the time the insurance was taken out may not be thwarted by a narrow or technical interpretation of the language employed. *Metropolitan Life Ins. Co. v. Johnson* (1911), 49 Ind. App. 233, 242, 94 N. E. 785; *Iowa Life Ins. Co. v. Houghton* (1910), 46 Ind. App. 467, 476, 87 N. E. 702; *Glens Falls Ins. Co. v. Michael* (1906), 167 Ind. 659, 666, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; *Havens v. Home Ins. Co.* (1887), 111 Ind. 90, 92, 12 N. E. 137, 60 Am. Rep. 689.

The principal controversy in this appeal arises over the question whether appellee's household goods destroyed by fire were covered by his policy which insured

them "while contained in the one and one-half story frame, with shingle roof, dwelling and additions situate at No. 6 Park street."

It appears without controversy, and in part by answers of the jury to the interrogatories, that a part of appellee's house was one and one-half stories high, and that the rear portion was one story high; that in the rear of such house, and about fifteen feet distant from the rear porch thereof, on the same lot, there was a frame outbuilding ten by twenty-eight feet, divided into three rooms; that such building came out to the line of an alley running along the side of said residence, and that a solid board fence was attached thereto and ran back along the alley to the main house; that a cement walk ran from the house to such outbuilding, which was entered from the walk by a door; that the room in said building nearest the main house, when the insurance was written and at the time of the fire, was used as a storage room for household effects and furniture; that at the time of the fire personal property of appellee to the value of \$70.75 was stored in such outbuilding and destroyed by the fire; that the damage to appellee's goods in the main building amounted to \$29.25.

Appellant contends that the insurance contract is evidenced only by the policy and that it cannot reasonably be so construed as to cover goods situate in the aforementioned outbuilding; that the policy cannot be changed or modified by parol proof. Appellee contends that the local agent inspected the premises before he wrote the insurance, and that both parties intended the description, referring to the property while in the house and additions thereto, to cover such property while in either the main building or in such outbuilding; that said outbuilding was in fact used as a portion of appellee's residence and was known to both parties to be so used when the insurance was applied for and the

policy written; that for the purpose of such contract the phrase "and additions," included, and was by the parties intended to include, the aforesaid outbuilding.

The contentions of appellant are in the main correct as abstract propositions of law. But under the general

rules of construction above set out we must as-

7. certain whether the language used in describing the property may reasonably be construed to cover the same while in said outbuilding without violating the rules of law applicable to written contracts. The word "addition," as applied to buildings, usually means a part added, or joined, to a main building, but such is not the exclusive meaning of the word. In insurance contracts, and in other written instruments, the use made of buildings more or less closely situated, their relative location, accessibility, and adaptability to some common end enters into the question, and from this it follows that in a limited sense each case must be determined from its own peculiar facts. The words "addition" or "additions" may and often do apply to buildings appurtenant to some other building though not actually in physical contact therewith. *Shepard v. Germania Fire Ins. Co.* (1911), 165 Mich. 172, 130 N. W. 626, 33 L. R. A. (N. S.) 156, notes; *Phenix Ins. Co. v. Martin* (1894), 16 South. 417; *Robinson v. Pennsylvania Ins. Co.* (1895), 87 Me. 399, 32 Atl. 996; *Tate v. Jasper County, etc., Ins. Co.* (1908), 133 Mo. App. 584, 113 S. W. 659; *Ideal Pump & Mfg. Co. v. American, etc., Ins. Co.* (1912), 167 Mo. App. 566, 152 S. W. 408; *Cargill v. Millers, etc., Ins. Co.* (1885), 33 Minn. 90, 22 N. W. 6; *Marsh v. Concord, etc., Ins. Co.* (1902), 71 N. H. 253, 51 Atl. 898, 899; *Georgia Home Ins. Co. v. Mayfield Planing Mills* (1909) (Ky.), 119 S. W. 1190; *Home Mut. Ins. Co. v. Roe* (1888), 71 Wis. 33, 36 N. W. 594; *Pettit v. State Ins. Co.* (1889), 41 Minn. 299, 43 N. W. 378; *North British, etc., Ins. Co. v. Tye*

Globe, etc., Ins. Co. v. Hamilton—65 Ind. App. 541.

(1907) 1 Ga. App. 380, 58 S. E. 110, 113; *Rickerson v. German, etc., Ins. Co. of New York* (1895), 85 Hun 266, 32 N. Y. Supp. 1026; *Workman v. Insurance Co.* (1830), 2 La. 519, 22 Am. Dec. 141, 143; *Updike v. Skillman* (1858), 27 N. J. Law 131; 1 C. J. 1190, and cases cited; 2 Joyce, Insurance (2d ed.) §§1739, 1744.

Applying the foregoing principles to the case at bar, and viewing the policy in the light of the knowledge of the parties of the location of the outbuilding and

8. the use made of it by appellee and the circumstances under which the policy was written and delivered, we hold that the word "additions," as used in the policy in suit, meant and was intended to mean any and all buildings on the premises used by appellee in maintaining his home, by storing or using his furniture and household effects therein, including the outbuilding in which the main portion of the goods destroyed by fire was located as above indicated.

We are inclined to the view that the second paragraph of answer was only an argumentative general denial to which an affirmative reply could not properly be addressed. But assuming, without deciding, that the answer is sufficient as the parties seem to have treated it, we hold that the court did not err in overruling the demurrer of appellant to appellee's special reply to the second paragraph of answer.

The same proposition runs through all the questions presented by the briefs on the motion for a new trial and the answers to interrogatories, and having

9. determined it adversely to appellant's contentions, it is unnecessary to consider the other questions in detail. The court will not search the record to reverse a judgment, though it may do so to affirm.

Mere abstract propositions of law, stated under points and authorities, though correct in prin-

10. ciple, are not sufficient to present reversible

error. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 627, 103 N. E. 652. Appellant was deprived of no substantial right, and the trial court committed no reversible error by any of the rulings of which appellant complains. Judgment affirmed.

NOTE.—Reported in 116 N. E. 597. Insurance: admissibility of parol evidence to modify insurance contract, Ann. Cas. 1914C 59; construction of fire policies, 132 Am. St. 438, 19 Cyc 656; construction of term "additions" in fire policies, 8 Ann. Cas. 94, 10 Ann. Cas. 938, 19 Cyc 665.

IN RE INDUSTRIAL BOARD OF INDIANA.

[No. 10,143. Filed November 2, 1917.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Construction.—Prosecutions.—Venue.*—Section 69 of the Workmen's Compensation Act, Acts 1915, p. 392, making it a misdemeanor for an employer accepting the compensation provisions of the law to fail to file with the Industrial Board, from time to time, evidence of his compliance with certain requirements of the act, requires that such evidence be deposited with the Industrial Board, the offices of which are, under §54, in Indianapolis, Marion county, and the venue of all prosecutions to impose the fine provided in §69 is in such county, since an offense involving an act of omission is committed where the act should have been done. pp. 551, 552.
2. EVIDENCE.—*Judicial Knowledge.—Location of City.*—The Appellate Court judicially knows that the city of Indianapolis is in Marion county, Indiana. p. 552.

From the Industrial Board of Indiana.

Certified question of law by the Industrial Board.

Question answered.

BATMAN, J.—Under the provision of §61 of the Workmen's Compensation Act of 1915 (Acts 1915 p. 392) as amended by the act of 1917 (Acts 1917 p. 154), the Industrial Board has certified to this court the following question of law: "Is the venue of all prosecutions to impose the fine provided for in section 69 of 'The Indiana Workmen's Compensation Act' in Marion county?"

Section 69 of said act reads as follows: "Every employer accepting the compensation provisions of this act shall within thirty days after this act takes effect file with the board in form prescribed by it, and thereafter annually or as often as may be necessary, evidence of his compliance with the provisions of section 68 and all others relating thereto. If such employer refuses or neglects to comply with these provisions he shall be punished by a fine of ten cents for each employe at the time of the insurance becoming due, but not less than one dollar nor more than fifty dollars for each day of such refusal or neglect and until the same ceases, and he shall be liable during continuance of such refusal or neglect to an employe either for compensation under this act or at law in the same manner as provided for in section 10."

It will be noted that this section makes the omission on the part of certain employers to perform a specified act, a misdemeanor punishable by fine. Section

1. 13 of the Bill of Rights (Art. 1) of the Constitution of this state provides: "In all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offense shall have been committed." Section 1867 Burns 1914, §1768 R. S. 1881, provides: "Every criminal action shall be tried publicly in the county in which the offense shall have been committed, except as otherwise provided in this act."

This leads us to a consideration of the place of the commission of the offense defined in said §69, *supra*. The misdemeanor created by said section consists in the failure on the part of an employer, accepting the compensation provisions of said act, to file with the Industrial Board evidence of his compliance with certain provisions thereof. Such act of filing evidently requires that such evidence be deposited with said board for offi-

cial custody. *Johnson v. Crawfordsville, etc., R. Co.* (1858), 11 Ind. 280; *Powers v. State* (1882), 87 Ind. 144; *Oats v. State* (1899), 153 Ind. 436, 55 N. E. 226; *Cleveland, etc., R. Co. v. Morrey* (1909), 172 Ind. 513, 88 N. E. 932.

By the provisions of §54 of the act the board "shall be provided with adequate offices in the capitol or some other suitable building in the city of Indianapolis, in which the records shall be kept and its official business be transacted during regular business hours." It is thus made apparent, in the absence of any provision to the contrary, that the place of filing such evidence of compliance is with such board at its office in said

2. city of Indianapolis, which the court judicially knows is in Marion county, Indiana. The Supreme Court of this state has held that a neg-

1. lect to do an act is punishable in the county where the act should have been done, in accord with the general rule that an offense involving an act of omission is committed where the act should have been done. *State v. Yocum* (1914), 182 Ind. 478, 106 N. E. 705. We therefore conclude that the question of law submitted must be, and is hereby, answered in the affirmative.

NOTE.—Reported in 117 N. E. 546.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY ET AL. v. PRIDDY ET AL.

[No. 9,072. Filed February 23, 1917. Rehearing denied June 22, 1917. Transfer denied November 2, 1917.]

1. APPEAL.—*Term-Time Appeal by One of Several Codefendants.—Notice to Appellees.—Rules of Court.*—Where one of several codefendants assigned error on the transcript filed in a term-time appeal by a coparty, but failed to perfect a term-time appeal, and did not serve notice of its appeal on appellees, who had entered no appearance, within ninety days after the filing of the transcript, and no excuse was offered for such

failure to observe Rule 36 of the Appellate Court, relating to notices in vacation appeals, the court will not relieve appellant from the enforcement of such rule on the ground that the failure of its observance was due to excusable accident, mistake, or oversight. pp. 557, 558.

2. **COURTS.—Rules.—Force and Effect.**—Court rules have the force and effect of law, and the duty to observe and follow them rests on litigants and courts alike, where there is no valid reason for their nonobservance. p. 558.
3. **APPEAL.—Vacation Appeal by One of Several Codefendants.—Notice.—Statute.**—Under §675 Burns 1914, Acts 1895 p. 179, providing that whenever a party, or any number of coparties against whom a judgment has been taken, shall appeal under §638 R. S. 1881, providing for term-time appeals, it shall not be necessary to make coparties parties to the appeal, but they shall be bound by the judgment on appeal as if made parties, and that, after any such appeal has been perfected, any coparty not joining therein may, while such appeal is pending, and within one year from the date of final judgment, assign errors for himself upon the record, and that he shall have all the rights, in relation to such appeal, that he would have had, had he joined in the appeal originally, a coparty assigning error on the transcript but not perfecting a term-time appeal is not relieved of giving to appellees the notices required to perfect a vacation appeal. pp. 559, 561.
4. **STATUTES.—Construction.**—In construing a statute, its several provisions must be read together, and such construction given it, if possible, as will be consistent with all its provisions. p. 561.
5. **CARRIERS.—Carriage of Freight.—Contract.—Scope.—Connecting Carriers.**—Where a consignment of freight is transported over several lines, the provisions of the contract entered into by the initial carrier are, if valid, for the benefit of the connecting carriers as well as the initial carrier, and such provisions must control the shipment. p. 570.
6. **CARRIERS.—Carriage of Freight.—Limitation of Liability.—Negligence.**—A carrier cannot by contract or otherwise exempt itself from liability for its negligence or that of its servants. p. 570.
7. **CARRIERS.—Carriage of Live Stock.—Negligence.—Liability of Carrier.**—Though a special contract under which a carload of mules was shipped imposed upon the shipper the duty of accompanying and caring for the stock while being transported, such contract, upon the shippers being refused permission to accompany the shipment, did not relieve the carrier, or any of its connecting lines, from liability for injury result-

ing from negligent failure to properly care for, feed and water the mules while enroute, since a carrier cannot exempt itself from liability for its own negligence. p. 570.

8. **CARRIERS.—***Carriage of Live Stock.—Contract.—Limitation of Liability.*—Where a carrier refused to permit a shipper to accompany a shipment of live stock for the purpose of caring for and feeding the same while enroute, the carrier cannot urge as an excuse for its failure to give the stock proper care, and as evidence of its reasonable and ordinary care in that respect the fact that such duty was assumed by the consignors under a special contract governing the shipment. p. 573.
9. **CARRIERS.—***Carriage of Live Stock.—Value Fixed by Contract.—Effect.*—An agreement on values in a special contract governing a shipment of live stock only has the effect of limiting the amount of the carrier's liability to the stipulated value, and does not require that in case of loss the damage assessed should be for such portion of the real loss as the agreed value sustained to the actual value. p. 574.
10. **APPEAL.—***Questions Presented.—Excessive Damages.—Briefs.*—In an appeal from a judgment for injury to a carload of live stock while in shipment, a contention that an item of damages was doubly assessed is not properly presented by appellant's briefs under the heading "Error in Conclusions of Law," nor is the question presented for review by a ground of the motion for a new trial alleging excessive damages, where such ground is not referred to either in appellant's points and authorities or in its brief under the heading "Error in Overruling Motion for New Trial." p. 574.
11. **CARRIERS.—***Carriage of Live Stock.—Evidence.—Admissibility.*—In an action against several railroads for injury to live stock while in shipment, where defendants contended that the special contract under which the shipment was made required the shipper to accompany and care for the consignment, evidence as to the initial carrier's refusal to permit the shipper to accompany the stock was admissible to explain his failure to do so. p. 575.
12. **APPEAL.—***Review.—Harmless Error.—Admission of Evidence.*—In an action against several railroads for injury to live stock while in shipment, where defendant connecting carrier's liability was fixed by reason of the fact that it accepted the stock knowing that it was unaccompanied and negligently failed to care for it, the question of the refusal of the initial carrier to permit the shipper to accompany the stock was immaterial, so that error, if any, in the admission of evidence relative to the initial carrier's refusal to allow the shipper to accompany the stock was harmless. p. 575.

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13. **CARRIERS.—Carriage of Live Stock.—Contract.—Construction.—Injury to Stock.—Notice of Claim.**—A provision in a live stock shipping contract for notice to the carrier of a claim for damages before the removal of the stock and before it is mingled with other stock to be valid must be reasonable, and should be given a reasonable construction in view of the facts of each particular case. p. 575.
14. **CARRIERS.—Carriage of Live Stock.—Injury to Stock.—Notice of Claim.—Compliance with Shipping Contract.**—In an action for injury to a carload of mules while in shipment, where the evidence showed that an agent of the delivering carrier was present when the mules were removed from the car and saw their condition, which required immediate attention, and which did not reveal the extent of their injury, and seven days after delivery the agent of the delivering carrier was served with a written notice containing an itemized statement of plaintiff's claim, there was a sufficient compliance with a stipulation in the contract of shipment requiring the giving of a written notice of a claim for damages before the removal of the stock from the carrier's premises and before it is mingled with other stock. p. 576.

From Huntington Circuit Court; *David E. Smith*, Special Judge.

Action by John L. Priddy and others against the Chicago, Indianapolis and Louisville Railway Company and others. From a judgment for plaintiffs the defendants, except the Louisville and Nashville Railroad Company, appeal. Appeal of Wabash Railroad Company dismissed. *Affirmed.*

Stuart, Hammond & Simms, Watkins & Butler, E. C. Field, H. R. Kurrie, C. C. Hine and Perry McCart, for appellants.

E. C. Vaughn and Lesh & Lesh, for appellees.

HOTTEL, C. J.—On January 22, 1915, appellees appeared specially in this cause and moved to dismiss the appeal as to the Wabash Railroad Company. The motion to dismiss contains seven grounds presenting in different form the question of the jurisdiction of the court over appellees as to any matter presented by the appeal between appellees and the said appellant Wabash

Railroad Company, because of the failure of such appellant to perfect its appeal in either of the methods prescribed by statute.

The facts on which the motion is based, as disclosed both by the motion and the record, are substantially as follows: The finding below was in favor of the appellees against the Chicago, Indianapolis and Louisville Railway Company and Wabash Railroad Company, and against appellees as to the Louisville and Nashville Railroad Company. The motion to dismiss the appeal is against the Wabash Railroad Company alone, and for the purposes of its consideration, the Chicago, Indianapolis and Louisville Railway Company and the Wabash Railroad Company alone will be treated and referred to as the appellants, and when the word "appellant" is used herein in the singular it will refer to the Wabash Railroad Company, unless otherwise designated. On June 17, 1914, after such trial and finding by the court below, the appellants each filed a separate motion for new trial, and they also filed a joint motion for new trial. On the same day each of these motions was overruled and judgment rendered in favor of appellees against appellants. From this judgment the appellant Chicago, Indianapolis and Louisville Railway Company prayed an appeal. The usual order granting the appeal was made, in which time for filing bill of exceptions and the amount of the bond were fixed, and the sureties named and approved all in accord with the statute providing for a term-time appeal. On July 14, 1914, and within the time given by the court, the Chicago, Indianapolis and Louisville Railway Company filed its appeal bond. This bond is set out in the record, and in all respects complies with the court's order, except that it is the bond of such company alone, and by its terms neither the principal nor sureties therein are held and bound to the payment of any judgment ex-

cept that which may be rendered against such Chicago, Indianapolis and Louisville Railway Company. On September 11, 1914, a transcript of the record in said cause was filed in this court, in which both of said judgment defendants below are named as appellants, and each of such appellants separately assign error thereon. After the filing of the transcript, and prior to the filing of appellees' motion to dismiss the appeal, no notice of any kind was served on either of appellees or their attorneys, or on the clerk of the court below, and appellant made no request of any kind on the clerk of this court for a notice of any kind to appellees or either of them or to their attorneys, and no notice of any kind was in fact issued by such clerk. Appellant took no steps of any kind to serve notice of its appeal on appellees or their attorneys, or to perfect its appeal in either of the modes prescribed by statute other than herein indicated, and appellees prior to their special appearance to dismiss the appeal have never entered any appearance to such appeal.

It will be seen from this statement of the record that appellant failed to perfect a term-time appeal, that, after the filing of the transcript herein, it al-

1. lowed ninety days to go by without taking any steps of any kind to serve any notice of its appeal on appellees, and that 180 days intervened between the rendition of the judgment below, and the filing of appellees' motion to dismiss the appeal. Appellant, in effect, concedes that under a strict construction of Rule 36 of this court and under the authority of the case of *Cincinnati, etc., R. Co. v. Acrea* (1906), 40 Ind. App. 150, 81 N. E. 213, its appeal must be dismissed.

It is insisted, however, in effect that the enforcement of Rule 36 is, in a measure, discretionary with the court, and that the ends of justice are not met by its rigid enforcement, where the failure of its observance is due

to accident, mistake, or oversight of the appealing party or his attorneys. In support of this contention appellant cites *Smythe v. Boswell* (1888), 117 Ind. 365, 20 N. E. 263; *Tate v. Hamlin* (1897), 149 Ind. 94, 41 N. E. 356, 1035; *Hanley v. Mason* (1907), 40 Ind. App. 180, 81 N. E. 610; *Bank of Westfield v. Inman* (1892), 133 Ind. 287, 32 N. E. 885; *Hutts v. Martin* (1892), 131 Ind. 1, 30 N. E. 698, 31 Am. St. 412; *Ewbank's Manual* (2d ed.) §160. These cases do not support appellant's contention. On the contrary, they each, either expressly or impliedly, hold that the mistake which will relieve an appellant from the enforcement of Rule 36, *supra*, must be one of fact, and that the oversight or neglect which will afford such relief must be shown to have been excusable. Any other holding would nullify the rule.

No excuse for appellant's failure to observe such rule appears from the record, or is offered in this case, which would not appear from the record in any case where a term-time appeal had been perfected by one of several coparties against whom a judgment had been rendered in the court below, and another coparty who had not perfected such an appeal assigned error on the transcript filed in this court.

The court rules have the force and effect of law, and the duty to observe and follow them rests on litigants and courts alike, where no valid reason can be

2. given for their nonobservance. *Webster v. Bligh* (1911), 50 Ind. App. 56, 58, 98 N. E. 73; *Magnuson v. Billings* (1898), 152 Ind. 177, 52 N. E. 803.

In the case of *Cole v. Franks* (1896), 147 Ind. 281, 46 N. E. 532, the Supreme Court, in speaking of the enforcement of Rule 36, *supra*, said: "This rule

1. would seem to govern in the case before us. A cause was appealed in vacation, and was placed on the docket June 19, 1896. Not until long after

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ninety days from this date, and not until steps were taken by appellees to have the appeal dismissed, did appellants take any steps to bring the appellees into court. It was then too late to give notice; and though the clerk did not enter an order of dismissal when the cause had been on the docket ninety days, yet the court will make such order so soon as its attention is called to the failure of appellants to give timely notice of the appeal." To the same effect, see *Smith v. Wells Mfg. Co.* (1896), 144 Ind. 266, 43 N. E. 131; *Shaefer v. Nelson* (1896), 17 Ind. App. 489, 491, 46 N. E. 1021; *Court of Honor v. Bankert* (1903), 31 Ind. App. 689, 690, 691, 68 N. E. 1039; *Ashley v. Henderson* (1903), 32 Ind. App. 242, 243, 69 N. E. 469; *Moore v. Bankers' Surety Co.* (1904), 34 Ind. App. 633, 635, 73 N. E. 607; *John V. Farwell Co. v. Newman* (1897), 17 Ind. App. 649, 659, 47 N. E. 234; *Doak v. Root, etc., Co.* (1900), 26 Ind. App. 138, 141, 142, 58 N. E. 444; *Bechtell v. Central, etc., Engineering Co.* (1914), 182 Ind. 568, 107 N. E. 73; *W. C. Hall Milling Co. v. Hewes* (1914), 57 Ind. App. 381, 105 N. E. 241; *Fort v. White* (1914), 58 Ind. App. 524, 108 N. E. 27; *Tate v. Hamlin, supra*; *Cincinnati, etc., R. Co. v. Acrea, supra*.

However, appellant's failure to comply with rule 36 is not the only ground on which appellees predicate their right to have the appeal dismissed as to appellant. They insist that appellant has not perfected its appeal in either of the methods provided by statute, and that 180 days have expired since the judgment was rendered below, and hence that the time within which the law requires an appeal to be taken has expired.

As affecting this question appellant insists that his appeal was perfected when the transcript and assignment of errors were filed in this court. On the question of when a vacation appeal is perfected there is

some confusion in the authorities, as will be evidenced by the following cases. *Tate v. Hamlin, supra*; *John V. Farwell Co. v. Newman, supra*, 648; *Hanley v. Mason, supra*; *Bank of Westfield v. Inman, supra*; *Nemitz v. State, ex rel.* (1906), 38 Ind. App. 509, 510, 78 N. E. 357; *Harshman v. Armstrong* (1873), 43 Ind. 126, 128, 129; *Dougherty v. Brown* (1898), 21 Ind. App. 115, 118, 51 N. E. 729; *Smythe v. Boswell, supra*; *Bruilets Creek Coal Co. v. Pomatto* (1909), 172 Ind. 288, 88 N. E. 606; *Hoeger v. Citizens' Street R. Co.* (1904), 35 Ind. App. 289, 73 N. E. 1095; *Coburn v. Whitaker, etc., Lumber Co.* (1894), 12 Ind. App. 340, 341, 38 N. E. 1094; *Holloran v. Midland R. Co.* (1891), 129 Ind. 274, 275, 276, 28 N. E. 549; *Helms v. Cook* (1914), 58 Ind. App. 259, 108 N. E. 147.

Whether a vacation appeal is perfected when the transcript and assignment of errors are filed in this court is not of controlling importance in the instant case, because it is conceded in effect by appellant that it took none of the steps necessary to perfect a vacation appeal; that all it did was to assign error on a transcript filed by a coparty who perfected a term-time appeal, and that its appeal is controlled by §675 Burns 1914, Acts 1895 p. 179; that its assignment of error appearing on the transcript filed by its coappellant who perfected an appeal under such section was all that was necessary to perfect its appeal, and that the case of *Cincinnati, etc., R. Co. v. Acrea, supra*, in so far as it announces a different rule should be overruled. This contention is based on the last provision of said section which reads: "After any such appeal has been perfected any coparty not joining therein may, at any time while such appeal is pending, and within one year from the date of the final judgment, assign errors for himself upon the record and have all questions, properly presented decided by the court, and he shall have all

the rights in relation to such appeal, that he would have had if he had joined in the appeal originally.”

The wording of this provision lends some support to appellant's contention. However, to arrive at a proper interpretation or construction of a statute, its

4. several provisions must be read together, and such construction or interpretation given it, if possible, as will be consistent with all its provi-

3. sions. When the section under consideration is so read it becomes manifest, we think, that its

controlling object and purpose is to provide an appeal in term whereby any one, or more, of a number of coparties, against whom a judgment has been taken, may appeal without making the remaining coparties parties to the appeal, and without having to give any of the parties to the judgment below any notice other than that which results from the taking of the steps necessary to perfect such an appeal, and at the same time bind all the parties to the judgment below by the judgment rendered on appeal.

In so far as the section purports to relieve an appealing party from the giving of the usual notice of appeal, its provisions apply to those only who perfect an appeal in the manner prescribed by the act. As an incident to the main purpose of the act, and to save the right of a vacation appeal to other coparties who may later make up their minds to take such an appeal, the latter clause of the section was added. It seems manifest that the legislature did not intend by such clause to give to the coparty who only assigns error, and who does not file a bond or take any of the steps required by the act to perfect a term-time appeal, the same rights against appellees which is given to the appealing party who complied with the statute. As before indicated, the only purpose of the latter clause, when read in the light of

what precedes it, was to save to such coparty his right to assign error on the transcript filed and perfect a vacation appeal by giving the notice required in such cases. This is the effect of the holding in the case of *Cincinnati, etc., R. Co. v. Acrea, supra*, and we see no reason to overrule or modify the rule there announced.

It follows that the appeal of appellant Wabash Railroad Company should be dismissed, and such appeal is dismissed.

OPINION ON MERITS.

HOTTEL, C.J.—This is a second appeal in an action for damages alleged to have been sustained by appellees in connection with the shipment of a carload of mules from Shelbyville, Tennessee, to Huntington, Indiana. The former appeal was from a judgment in appellees' favor based on a single paragraph of complaint, the substance of which is set out in the opinion rendered in that case and reported in 179 Ind. 483, 101 N. E. 724, under the title, "*Wabash R. Co. v. Priddy*."

An examination of that opinion will disclose that the reversal of the former judgment was based on two grounds, viz.: (1) A failure in the proof and finding of facts to show the partnership between the initial and several connecting carriers, and the joint liability based thereon alleged in the complaint upon which such judgment was predicated. (2) The refusal of the trial court to admit in evidence the special contract of shipment under which appellants claimed the stock was shipped.

It will appear from that opinion that the initial carrier, the Nashville, Chattanooga and St. Louis Railway Company, hereinafter referred to as the "N. C. & St. L. Co.," was not sued in the action, and there was a finding and judgment by the trial court upon the former trial in favor of the first connecting carrier, the Louisville

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and Nashville Railroad Company, hereinafter referred to as the "L. & N. Co." The appeal was by the appellants, the Chicago, Indianapolis and Louisville Railway Company, hereinafter referred to as the "C. I. & L. Co.," and by the Wabash Railway Company, hereinafter referred to as the "W. Co." There was no appeal from the judgment in favor of the L. & N. Co.

After the rendition of said opinion, the appellees filed an amended complaint in two paragraphs against the three original defendants, the first paragraph of which is based on a common-law liability, its averments being substantially the same as indicated in the former opinion herein, except that there are no averments of partnership. The second paragraph contains substantially the same averments, but is predicated on a special contract which is filed as an exhibit with said paragraph. The C. I. & L. Co. and the W. Co. each answered by a general denial, and the L. & N. Co. filed a general denial and an answer setting up the former judgment in its favor. There was a trial by the court, and at the request of the parties, it returned a special finding of facts, with its conclusions of law thereon. By its conclusions of law, the court found the law to be with appellees that they were damaged in the sum of \$1,575, which amount they were entitled to recover from the C. I. & L. Co. and the W. Co., together with their costs, and that the L. & N. Co. should have judgment in its favor against appellees for costs. Exceptions to said conclusions of law were properly saved by the C. I. & L. Co. and the W. Co. Each of said companies filed a separate motion for new trial, and they also filed a joint motion for new trial, each of which motions was overruled, and exceptions saved.

A motion to dismiss the appeal of the W. Co. was sustained by this court, March 25, 1915. *Chicago, etc., R. Co. v. Priddy, ante* 552, 108 N. E. 238.

We therefore are required to consider only the errors assigned by the C. I. & L. Co., which are as follows: (1) The court erred in its conclusions of law as to the C. I. & L. Co., upon the facts found specially by it in said cause. (2) The court erred in overruling the motion of appellant C. I. & L. Co. for a new trial.

It is very earnestly contended by appellees that, on account of its failure to comply with the rules of the court in the preparation of its brief, appellant has presented no question for the consideration of the court. The brief is open to criticism in that it consists in the main of general propositions of law without any attempt to apply them to the particular error relied on. However, the first eleven propositions appear under the heading "Error in Conclusions of Law" and are in the main general principles which are of more or less controlling influence in determining whether the facts found warrant the conclusions of law stated thereon, and hence are sufficient, we think, to advise the court at least as to the main ground upon which such conclusions are challenged. To this extent, the propositions set out in the brief will be considered and the questions presented thereby determined. *Indiana Mfg. Co. v. Coughlin* (1917), 65 Ind. App. 268, 115 N. E. 260.

The complaint and findings of fact are lengthy, and their substance will be indicated only in so far as we think necessary to an understanding of our disposition of the questions to be considered. To avoid repetition, we shall first state certain general facts substantially as they are shown by each paragraph of the complaint, the finding, and the evidence.

At about 4 o'clock p. m., on January 31, 1907, appellees delivered to the N. C. & St. L. Co., at Shelbyville, Tennessee, twenty-eight mules in good condition, to be shipped to Huntington, Indiana. Said mules were

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received by said company and placed in a car and shipped over its line of road to Nashville, where they were transferred and delivered in good condition to the L. & N. Co., which company accepted them and carried them over its line of road to Louisville, Kentucky, where they were delivered to the C. I. & L. Co., which company accepted them and transported them over its line of road to Lafayette, Indiana, where it delivered them to the W. Co., and it accepted them and carried them over its line of road to Huntington, Indiana, their point of destination, where they arrived on February 5, and were there delivered to the appellees. The through rate agreed upon by the initial carrier and appellees for the transportation of said carload of mules was \$113. They were shipped over the entire route in the same car, and were at no time accompanied by any caretaker. The initial carrier refused to permit appellees, or any one for them, to accompany said mules on the trains. Delays in transportation, exposure, neglect, and failure to feed, water, and take care of the stock are charged in each paragraph of complaint against the L. & N. Co., the C. I. & L. Co., and the W. Co., and such facts are found by the court against the C. I. & L. Co., substantially as alleged.

Other facts found by the court and authorized by the evidence, affecting appellant and the questions which it seeks to have determined by its appeal, are in substance as follows: Said carload of mules was delivered by the L. & N. Co. to the C. I. & L. Co. at New Albany, Indiana, at 1:30 p. m. February 2, 1907, in good condition. They arrived at Bloomington, Indiana, between 10 and 11 p. m. of said day. They were unloaded about midnight of same day, given hay and water, and reloaded about 7:30 a. m. on February 3, at which time they were in good condition. They arrived at Lafayette about 5 p. m. of the same day, where

they were taken to the stockyards, unloaded, and placed in open pens without covering, where they remained until 9:30 a. m. of the following day, at which time they were again loaded into said car, and the car was sealed and they were permitted to remain in the yards of the company until 2:30 p. m., when they were delivered to the W. Co. The mules had not been properly and sufficiently fed with hay and grain for a period of more than two days immediately prior to their arrival at Huntington, and by reason thereof were in a starved condition when they arrived. After leaving Bloomington, and while en route to Lafayette, the slats on the car were gnawed and eaten by the mules, one of the slats being gnawed through so that one of the mules got his leg through the opening. Said mule was permitted to remain in this condition until the flesh was torn from its leg and it was partly frozen. When the mules arrived at Huntington and were unloaded the door of the car through which they were to be unloaded was frozen fast in the cinders, which had been used as bedding, and in the offal from said mules. One Hargrove, the local passenger and freight agent of the W. Co., directed appellees Heffner and Shaw to remove the door, by removing the attachments at the top of the door. The door was thus taken down. Hargrove was present while the mules were being removed and learned and knew at the time the condition of the mules and car. One of the mules was dead and lying on the floor of the car. Another was down, and while down was removed to the platform outside the car and raised to its feet by a derrick. It could not walk without assistance. All the other mules were suffering from want of food and water, and were starved and gaunt. The mules, because of lack of food, had gnawed and eaten the timbers, slats, and rafters of said car. The tail brushes and manes of many of the mules had been eaten off. Two

of the mules that were living when said car reached Huntington were so badly injured by reason of said lack of proper care and attention on the part of the employes and agents of said C. I. & L. Co. and said W. Co., and because of their failure to feed them, that they could not recover and it became necessary to have them killed. One of these was the mule which got its leg through the car and was permitted to remain in this condition until it was unloaded at Huntington. The foot of this mule finally came off, making it necessary to kill it. When the mules were placed in said car at Shelbyville, Tennessee, appellee Heffner requested the agent of the N. C. & St. L. Co. that he be permitted to accompany said carload of mules on the trains that were to carry the mules to Huntington, and offered to purchase his ticket and pay his fare for such passage, and said ticket agent refused to sell him a ticket, and refused to permit him to accompany said mules, and informed him that it was the business of the companies to care for and feed said animals. A reasonable time for the shipment of said mules from New Albany, Indiana, to Huntington, Indiana, over the lines of the C. I. & L. Co. and the W. Co., including five hours for rest, feed, and water, would be thirty-one hours. Said last-named companies did not ship the mules over their lines with reasonable dispatch, but unnecessarily delayed their shipment. Such defendants did not give the animals sufficient food during the time they were being transported, but negligently suffered them to become injured from want of food, and to become starved, gaunt, and weakened from lack of care and attention, and from unnecessary delay in shipment, to the injury of all of said mules.

The special contract of shipment, made part of the second paragraph of complaint, contains many limitations and conditions of liability, important among which, as affecting appellant's contention that the facts

found by the court do not warrant the conclusions of law stated thereon, are the following:

"3. The said party of the second part further agrees that he or his agent will load and unload said stock at his own risk, and feed, water and attend the same at his own expense and risk while it is in the stockyards of the party of the first part awaiting shipment or delivery, or at feeding or transfer points en route, or where it may be unloaded for any purpose, and it is agreed that any expense so incurred by the party of the first part, in behalf of the party of the second part or his agents or assigns, for feeding, watering, loading, unloading, or detention and care of such stock, shall be assessed against such stock and collected from connecting carrier and consignee, upon delivery.

"6. It is further agreed that, in case of accident to or delay of trains from any cause whatever, the owner and shipper is to feed, water and take proper care of stock at his expense.

"10. The party of the second part, for the consideration above mentioned, further agrees that, in the event of damage, injury or loss occurring to said stock, for which the party of the first part may be liable, before said stock is removed from the possession or premises of the party of the first part, or is mingled with other stock, he will give notice of his claim, in writing, to the carrier's station freight agent at the point of destination, if for a station on the line of the party of the first part, and to its station freight agent at the terminus or junction point at which it is to be delivered to the connecting carrier, if for a destination beyond the line of the carrier of the first part, and if the stock is unloaded before reaching destination or point of delivery to the connecting carrier, the said party of the second part agrees to give said notice in manner and form as herein above specified, to the station freight agent at such point of unloading or the nearest agency station thereto; in all of which cases, the said station freight agent shall be given opportunity to inspect said stock."

Appellant's contention, and the general propositions

of law upon which it bases such contention, may be summarized as follows: Where there is a special contract of shipment, as in this case, such contract constitutes the agreement under which the shipment was moved, and there can be no common-law liability (citing, *Cleveland, etc., R. Co. v. Hollowell* [1909], 172 Ind. 466, 88 N. E. 680, and *Armocost, Admr., v. Lindley, Admr.* [1888], 116 Ind. 295, 298, 19 N. E. 138); that, as the shipment in question was interstate, the validity of the terms and conditions of the contract under which it is made is governed by the Interstate Commerce Law (*Kansas City, etc., R. Co. v. Carl* [1912], 227 U. S. 638, 33 Sup. Ct. 391, 57 L. Ed. 683, 687; *Adams Express Co. v. Croninger* [1912], 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257; *Wabash R. Co. v. Priddy, supra*); that the provisions in the contract in question formed a part of the tariff rate for a limited-liability shipment published and filed with the Interstate Commerce Commission, and hence had the effect of law and were binding on shipper and carrier alike (see *Texas, etc., R. Co. v. Abilene, etc., Co.* [1906], 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Wabash R. Co. v. Priddy, supra*; *Chicago, etc., R. Co. v. Kirby* [1911], 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann Cas. 1914A 501; *Baltimore, etc., R. Co. v. New Albany Box, etc. Co.* [1911], 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28); that one of the purposes of the Interstate Commerce Act and the amendments thereto is the enforcement of absolute equality between shippers, and to prevent any and all means, direct or indirect, that may be resorted to to obtain or receive concession or rebate from the fixed rates duly posted and published; that under such act any privilege or advantage extended to one shipper not extended to others which affects the value of the services received by the shipper, and the costs of such serv-

ice to the carrier, is a discrimination in favor of such shipper, and in violation of such act. *Texas, etc., R. Co. v. Abilene, etc., Co., supra*; *Chicago, etc., R. Co. v. Kirby, supra*, and cases there cited.

Upon these general propositions and the cases cited in their support, appellant argues that the provisions Nos. 3 and 6 of the special contract, *supra*, imposed upon appellees the duty of accompanying and taking care of, and feeding and watering their stock; that all the damage shown by the finding to have resulted to said stock was caused by their failure to comply with said provisions; that appellees were bound by such provisions and that they inured to the benefit of the connecting carriers, and any waiver or attempted waiver thereof by any such carrier would be a discrimination in appellees' favor, and hence forbidden by said Interstate Commerce Act. The general propositions

5. of law upon which appellant bases its contention may be conceded to be stated with substantial accuracy, and it may be admitted that each of the provisions of said contract, in so far as they are valid, are for the benefit of the connecting carriers as well as the initial carrier (*Kansas City, etc., R. Co. v. Carl, supra*), and to the extent that they are valid, they must be upheld and must control the shipment. It is well

6. settled, however, by decisions both prior to and since the enactment of the Interstate Commerce Act, that a carrier can in no case exempt itself from liability for its own negligence or that of its servants. *Wabash R. Co. v. Priddy, supra*; *Adams Express Co. v. Croninger, supra*, and cases there cited.

It follows that, though such carrier may contract for the shipper to accompany and care for such stock, it cannot thereby relieve itself, or any connecting

7. carrier, from its or their *negligent failure* to perform such duty, and, to the extent that any

provision of a special contract would attempt to relieve the carrier from such a liability, it would be invalid and void. Such, we think, is the implied holding of most of the cases cited and relied on by appellant, among them the case of *Adams Express Co. v. Croninger, supra*. In that case (pp. 506, 507, 509, 510), in speaking of a stipulation limiting liability to the value of the articles shipped as agreed upon and set out in the special contract, the court, by Lurton, J., said: "What is the liability imposed upon the carrier? (by the Interstate Commerce Act, as amended by the Act of June 29, 1906, 34 Stat. at L. 584 [U. S. Comp. Stat. Supp. 1911 p. 1288]). It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. * * *

*That a common carrier cannot exempt itself from liability from its own negligence or that of his servants is elementary. * * ** The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. * * *

'The limitation as to value has no tendency to exempt from liability for neg-

ligence. It does not induce want of care.'" (Our italics.)

The contract in the instant case apparently recognizes the principle announced in the case just quoted, because the stipulation in question does not purport to exempt the carrier from liability for a negligent failure on its part to discharge the duties which such stipulation imposes upon appellees, but simply provides that any expense incurred by the carrier in the performance of such imposed duty may be "assessed against such stock and collected from * * * consignee upon delivery."

It is true that some of the cases cited by appellant—notably, *Williams v. Central of Georgia R. Co.* (1903), 117 Ga. 830, 43 S. E. 980; *Central of Georgia R. Co. v. James* (1903), 117 Ga. 832, 45 S. E. 223; *Ragsdale v. Southern R. Co.* (1903), 119 Ga. 627, 46 S. E. 832; *Southern R. Co. v. Tollerson* (1910), 135 Ga. 74, 68 S. E. 798; *Kent v. Central of Georgia R. Co.* (1915), 144 Ga. 7, 89 S. E. 1017—seem to lend some support to its contention, but the facts in those cases, and the reasons given for the holding, distinguish them from the instant case as is evidenced by the following language of the court in the case of *Southern R. Co. v. Tollerson*, *supra*, 78: "If by a valid contract the shipper undertakes to accompany the stock himself or have some person accompany them as his agent, and to feed and water them, and the railroad company furnishes him with facilities and opportunity for that purpose, he cannot violate his contract, and yet claim not to be in default. 4 Elliott, Railroads (2d ed.) 1554; *Missouri Pac. Ry. Co. v. Texas & Pac. Ry. Co.*, 41 Fed. 913; *Fort Worth, etc., Ry. Co. v. Daggett*, 87 Tex. 322 (28 S. W. 525). This shipment was prior to the act of Congress of 1906, commonly called the Hepburn Act; and it is therefore unnecessary to consider the effect of that act."

Section 7 of said Hepburn Act (Act June 29, 1906, ch. 3591, §7, 34 Stat. at L. 595 [U. S. Comp. Stat. Supp. 1907 p. 909]), provides: "That any common carrier, * * * receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, * * * to which such property may be delivered or over whose line * * * such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier * * * from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." (Our italics.) It seems to us that the addition of this provision to the Interstate Commerce Act, especially the italicized words, *supra*, materially changed such act in its effect upon the question under consideration, and takes from the earlier cases cited by appellant whatever influence they may have had on such question. *Chicago, etc., R. Co. v. Scott* (1913), (Tex. Civ. App.), 156 S. W. 294; *Chicago, etc., R. Co. v. Linger* (1913), (Tex. Civ. App.), 156 S. W. 298; *McKahan v. American Express Co.* (1911), 209 Mass. 270, 95 N. E. 785, 35 L. R. A. (N. S.) 1046, Ann. Cas. 1912B 612.

What effect the stipulation of the contract under consideration might have on the question whether the *carrier was negligent* if the appellees had accom-

8. panied the stock, or if the carrier had offered them the opportunity to accompany it, and had not known that the stock was unaccompanied, we need not decide, because there is an express finding in the instant case that the initial carrier refused to permit appellees to accompany it, that it was unaccompanied

when received and accepted for shipment by appellant, and that they knew it was unaccompanied. It follows that appellant is in no position to urge as an excuse for its failure to perform the duty of looking after and caring for said stock, and as evidence of its reasonable and ordinary care in such respect, the fact that said duty was assumed by appellees.

The finding above set out clearly shows a *negligent* failure to perform this duty and a damage to the stock resulting therefrom, and hence a liability from which appellant could not be relieved.

Appellant, in its brief, under the heading "Error in Conclusions of Law," makes the point that the damage assessed should have been for such portion

9. of the real loss as the value agreed upon in the special contract sustained to the actual value of the stock, but in its oral argument conceded, and properly so, that such agreement as to values only has the effect of limiting the amount of the liability to the stipulated value. *United States Express Co. v. Joyce* (1905), 36 Ind. App. 1, 69 N. E. 1015; *Id.* (Ind.), 76 N. E. 1117.

It is further contended that an item for the money expended in curing the mules was improperly included in the amount of the damages assessed, making

10. a double assessment as to such item. Assuming, without so deciding, that this is true, the question is not properly presented by appellant's briefs under the heading "Error in Conclusions of Law." The only way, if any, in which such question can be said to have been presented to the trial court for correction was by the ground of the motion for new trial alleging that the damages assessed are excessive, and this ground is not referred to in appellant's points and authorities, and is not referred to in its brief under the heading "Error in Overruling Motion for New Trial."

Under the heading "Error in Overruling Motion for New Trial," appellant states numerous general propositions which we assume are intended to apply to that ground of the motion which challenges the evidence as being insufficient. It is contended that there is no evidence to show that any of the injuries of the mules complained of and found by the court occurred while they were in appellant's possession, or that appellant was guilty of any negligence. Our examination of the evidence convinces us that the trial court was warranted in its findings indicated *supra*.

Appellant also insists that the court erred in permitting the evidence relative to the initial carrier refusing to permit appellees to accompany their stock.

11. We think the evidence was proper, at least to explain appellees' failure to accompany the stock. *Welker v. Appleman* (1909), 44 Ind. App. 699, 90 N. E. 35; *Hanley v. Chicago, etc., R. Co.* (1912), 154 Ia. 60, 134 N. W. 417, 66 Am. & Eng. R. Cas. 702. Whether such refusal could be charged against appellant, or what effect it would have upon the question of its liability, is not of controlling influence in view

12. of the fact that the finding shows that appellant accepted the stock knowing that it was unaccompanied by a caretaker, and that after so accepting such stock it *negligently* failed to care for it in the respects set out in the finding. Appellant's liability was fixed by said finding regardless of said evidence, and its admission was, in any event, harmless.

It is also claimed that the evidence shows a failure to comply with provision No. 10 of the special contract above set out, and that such failure bars a re-

13. covery. Such a provision to be valid must be reasonable, and should, in any event, be given a reasonable construction in view of the facts of each particular case. *Louisville, etc., R. Co. v. Steele* (1892), 6

Ind. App. 183, 33 N. E. 236; *Richardson v. Chicago, etc., R. Co.* (1899), 149 Mo. 311, 50 S. W. 782; *Glenn & Sons v. Southern Express Co.* (1888), 86 Tenn. 594, 8 S. W. 152; *Goggin v. Kansas, etc., R. Co.* (1874), 12 Kan. 416; *Baxter v. Louisville, etc., R. Co.* (1897), 165 Ill. 78, 45 N. E. 1003.

The evidence and finding of facts both show that the agent of the W. Co. was present and assisted and gave directions in the removal of the mules, and saw

14. that one of them was dead and that the condition of the others was such that they needed to be immediately taken away and cared for. Their condition was such that appellees could not then know the extent of their injury. Seven days after the delivery of the mules at Huntington, to wit, on February 12, 1907, the agent of the W. Co. was served with a written notice containing an itemized statement of appellees' claim. This was a sufficient compliance with said stipulation in the light of the facts disclosed by the evidence and finding. *Louisville, etc., R. Co. v. Steele, supra*; *Ormsby v. Union Pacific R. Co.* (1880), 4 Fed. 170; *Kime v. Railway Co.* (1910), 153 N. C. 398, 69 S. E. 264, 61 Am. & Eng. R. Cas. 704; *Hinkle v. Railway Co.* (1900), 126 N. C. 932, 36 S. E. 348, 78 Am. St. 685; *Western R. Co. v. Harwell* (1893), 97 Ala. 341, 11 South. 781; *Harned v. Missouri, etc., R. Co.* (1892), 51 Mo. App. 482; *Gulf, etc., R. Co. v. Stanley* (1895), 89 Tex. 42, 33 S. W. 109; *Atchison, etc., R. Co. v. Collins* (1891), 47 Kan. 11, 27 Pac. 99; *Atchison, etc., R. Co. v. Temple* (1891), 47 Kan. 7, 27 Pac. 98; 13 L. R. A. 362; *Missouri, etc., R. Co. v. Davis* (1909), 24 Okl. 677, 104 Pac. 34, 24 L. R. A. (N. S.) 866.

Finding no reversible error in the record, the judgment below is affirmed.

NOTE.—Reported in 108 N. E. 238, 115 N. E. 266. Carriers: limitation of liabilities of carriers of live stock, 63 Am. St. 565;

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removal of live stock from carrier's premises before notice of claim for damages, where such notice is given in time for examination, 24 L. R. A. (N. S.) 866; validity and effect of contract stipulation limiting time to present claim against owner of live stock, 9 Ann. Cas. 17, 14 Ann. Cas. 416, Ann. Cas. 1914A 231; liability of connecting carrier for loss beyond its line, 31 L. R. A. (N. S.) 1. See under (7, 9) 10 C. J. 164; (13, 14) C. J. 332.

RILEY ET AL. v. FIRST TRUST COMPANY,
ADMINISTRATOR.

[No. 9,609. Filed November 13, 1917.]

1. **APPEAL.—Review.—Assignment of Errors.—Insufficiency of Complaint.—Statute.**—Since the enactment of §348 Burns 1914, Acts 1911 p. 415, the sufficiency of a complaint for want of facts cannot be assailed for the first time by assignment of error on appeal. p. 578.
 2. **APPEAL.—Review.—Striking Out Motion for New Trial.**—Where defendants filed their application for a new trial with the clerk within thirty days from the date of judgment, but the record does not disclose that the trial court was in vacation at such time, so that the application could properly be filed with the clerk under the provisions of §587 Burns 1914, Acts 1913 p. 848, and it appears from §1461 Burns 1914, Acts 1913 p. 62, relating to the terms of the several circuit courts, that the application was filed on a date when the trial court might have been in regular session, the court on appeal cannot say that the trial court erred in sustaining plaintiff's motion to strike out the application for a new trial because not filed in open court, such motion containing a statement, which was uncontroverted by defendants, that the trial court was in session on the date the application was filed. pp. 579, 580.
 3. **EVIDENCE.—Judicial Notice.—Sessions of Court.—Records.**—In passing on a motion to strike out an application for new trial, because not filed in open court, the trial court was required to take judicial knowledge of its terms, the dates when in session, and of its own records, regardless of the affidavits of the parties, and was bound by such knowledge. p. 580.
 4. **APPEAL.—Review.—Ruling on Motion to Modify Judgment.—Failure to Save Exception.**—An assignment of error predicated on the action of the trial court in sustaining plaintiff's motion to amend and modify the judgment presents no question for
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review, where the record fails to set out the motion, and does not show that any objections were made, or exceptions taken, to the court's ruling on such motion. p. 580.

5. APPEAL.—*Waiver of Error.*—*Briefs.*—Assigned error not presented in appellant's brief is deemed waived. p. 581.

From Porter Circuit Court; *H. H. Loring*, Judge.

Action by the First Trust Company, administrator, against Jennie Riley and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Walter J. Fabing, for appellants.

D. E. Kelly and *Daly & Freund*, for appellee.

BATMAN, J.—This action was brought by appellee to recover certain moneys, which it alleged belonged to it, as administrator of the estate of Joseph Crowe. The complaint was in a single paragraph and was answered by a general denial. Trial by the court and judgment in favor of appellee.

Appellants' assignment of errors in this court alleges:

- (1) The insufficiency of the complaint to constitute a cause of action against appellants or either of them.
- (2) Error in sustaining appellee's motion to strike out, and in striking out appellants' separate and several motion for a new trial.
- (3) Error in sustaining appellee's motion to amend and modify the judgment.

Since the amendment of §348 Burns 1908 (Acts 1911 p. 415), there has been no authority for assailing a complaint for want of facts for the first time by as-

1. signment of error in this court. It follows that no reversible error is presented by the first assigned error. *Robinson v. State* (1911), 177 Ind. 263, 97 N. E. 929; *Stiles v. Hasler* (1913), 56 Ind. App. 88, 104 N. E. 878; *Indiana Life Endowment Co. v. Carnithan* (1916), 62 Ind. App. 567, 109 N. E. 851; *American Car, etc., Co. v. Williams* (1916), 63 Ind. App. 1, 113 N. E. 252.

Appellants predicate error on the action of the court in sustaining appellee's motion to strike out, and in striking out their motion for a new trial. It

2. appears from the record that judgment was rendered in this cause on November 13, 1914, and that appellants filed their motion for a new trial in the office of the clerk of the Porter Circuit Court on December 10, 1914. Appellee filed its verified motion to strike appellants' said motion from the files on the ground that the court in which said cause was tried was in session at the time such motion for a new trial was filed, and that the same was not filed in open court. The filing of such motion has been recognized by this court as a proper procedure. *Intermediate Life, etc., Co. v. Cunningham* (1915), 59 Ind. App. 326, 108 N. E. 17. Appellants filed an affidavit of their attorney in opposition to appellee's said motion, in which it is alleged, as an excuse for not filing their motion for a new trial in open court, that the term of court at which the decision and finding was announced in the cause had adjourned prior to thirty days after the rendition of such decision, and prior to December 10, 1914. Since the taking effect of §587 Burns 1914, Acts 1913 p. 848, motions for a new trial, to be effective, must be filed within thirty days from the time when the verdict or decision is rendered. Under former sections, governing applications for a new trial, it was held that a motion for a new trial must be filed and presented to the court, and that filing the same with the clerk was not sufficient. *Emison v. Shepard* (1889), 121 Ind. 184, 22 N. E. 883; *Levey v. Bigelow* (1893), 6 Ind. App. 677, 34 N. E. 128; *William Deering & Co. v. Armstrong* (1897), 18 Ind. App. 687, 48 N. E. 1045; *Owen v. Harriott* (1910), 47 Ind. App. 359, 94 N. E. 591. The present section, however, recognizes that the thirty-day period for filing such motion may expire at a time when the trial court

is not in session, and hence contains a provision for filing the same in the office of the clerk. A recent construction of this section limits the time when such motion may be so filed to the vacation period of such court. *Allen v. Powell* (1917), *post* 601, 115 N. E. 96. The record in this case does not disclose that the trial court was in vacation at the time of filing such motion for a new trial. The verified motion to strike the same from the files states that the trial court was in session at such time. The showing made by appellants does not deny such fact, but only asserts that the term of court at which the decision was rendered had adjourned prior to such time. Section 1461 Burns 1914 (Acts 1913 p. 62) shows that the date on which such motion was filed was at a time when such court might have been in regular session. The trial court in passing on such motion was required to take judicial

3. knowledge of its terms, the dates when in session, and of its own records, regardless of the affidavits of the parties, and is bound by such
2. knowledge. In so doing such court may have found that it was in session when said motion for a new trial was filed, and, if so, its action in striking the same from the files was authorized. Under the well-established rule that on appeal all presumptions are to be indulged in favor of the rulings of the trial court, and that the burden is on the appealing party to show error prejudicial to him, we cannot say that the court erred in striking appellants' motion for a new trial from the files. *Eastman v. Smith* (1914), 56 Ind. App. 621, 105 N. E. 64; *Lake Erie, etc., R. Co. v. Reed* (1914), 57 Ind. App. 65, 103 N. E. 127.

Appellants have failed to present any question for our determination by their assignment of error with reference to the action of the court in sustaining

4. appellee's motion to amend and modify the judg-

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ment. The record fails to set out the motion, and fails to show that any objections were made to the ruling thereon, or that any exceptions were taken to the action of the court in sustaining the same. An exception to the action of the trial court must be shown by the record in order to have the same reviewed on appeal. *Houk v. Citizens' Nat. Bank* (1912), 51 Ind. App. 628, 99 N. E. 437; *M. S. Huey Co. v. Johnston* (1904), 164 Ind. 489, 73 N. E. 996.

Appellants have also failed to present any such alleged error in their brief, and must therefore be held to have waived the same. *Hamilton v. Hanneman* 5. (1897), 20 Ind. App. 16, 50 N. E. 43; *Heltonville Mfg. Co. v. Fields* (1894), 138 Ind. 58, 36 N. E. 529; *Guy v. Blue* (1896), 146 Ind. 629, 45 N. E. 1052. Judgment affirmed.

NOTE.—Reported in 117 N. E. 675.

INDIANAPOLIS TRACTION AND TERMINAL COMPANY
v. VAUGHN.

[No. 9,312. Filed November 13, 1917.]

1. APPEAL.—*Review.*—*Directed Verdict.*—*Conclusiveness.*—Where both parties moved for a peremptory instruction, and defendant after its motion had been denied and plaintiff's motion had been granted, made no request for submission to the jury, the request for a directed verdict amounted to an admission that there was no conflict in the testimony and a request that the facts be determined by the court, and the finding made is conclusive on appeal if there is any evidence to support it. p. 582.
2. STREET RAILROADS.—*Collision in Streets.*—*Action.*—*Evidence.*—*Sufficiency.*—*Negligence.*—*Contributory Negligence.*—In an action against a street railroad company for injuries sustained in a collision with a street car, evidence tending to show that plaintiff, as he was about to drive a team and wagon over the car tracks at a street intersection, looked for approaching cars but saw none, that when he got upon the tracks he was struck by a car that did not sound the gong or give other signal of

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its approach, that the headlight was insufficient for cars running in the locality where the accident occurred, and that the car was traveling at such a high rate of speed that plaintiff was thrown fifty feet when struck and the car ran 100 feet after the accident before it was brought to a stop, is sufficient to warrant the conclusion that plaintiff was free from contributory negligence and that defendant was negligent. p. 583.

3. **APPEAL.—Review.—Directed Verdict.—Damages.—Submission to Jury.—Failure to Object.**—In an action for personal injuries, where the trial court, after directing a verdict for plaintiff, submitted to the jury the question of damages, and defendant made no objection before the verdict was returned and no claim that the practice was erroneous until filing its motion for a new trial, it could not complain on appeal. p. 585.
4. **APPEAL.—Review.—Evidence.—Sufficiency.**—Where inferences may be drawn from the evidence which will support the decision of the trial court, the judgment will not be reversed on the ground of insufficiency of evidence. p. 585.

From Marion Superior Court (97,113); *Theophilus J. Moll*, Judge.

Action by Isaac Vaughn against the Indianapolis Traction and Terminal Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

W. H. Latta and *F. Winter*, for appellant.

William E. Reiley and *Paul G. Davis*, for appellee.

IBACH, P. J.—Appellee sued appellant to recover damages for personal injuries alleged to have been received by him in a collision between his wagon and one of appellant's cars at a street crossing.

The case was submitted to a jury; but at the close of plaintiff's evidence, which was all the evidence introduced, defendant (appellant) moved for a per-

1. emptory instruction in its favor which was denied and exception reserved; thereupon plaintiff (appellee) moved for a like instruction in his favor, which was granted. The record discloses also that, after appellant's motion had been overruled and appellee's motion had been granted, no request on appellant's

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part was made that the whole case, or any part of it, should be left with the jury for their consideration. Under such a state of facts the request of both parties for a directed verdict amounts to an admission that there was no conflict in the testimony and a request that the facts be determined by the trial court. *Deeter v. Burk* (1915), 59 Ind. App. 449, 107 N. E. 304, 306, and cases cited. And the finding made by the court is conclusive here if there is any evidence to support it. *Deeter v. Burk, supra*; *Merwin v. Magone* (1895), 70 Fed. 776, 17 C. C. A. 361.

The same proposition has been stated in this language: "The effect of a request by each party for a direction of a verdict in his favor clothed the court with the functions of the jury, and it is well settled that in such case where the party whose request is denied, does not thereupon request to go to the jury on the facts, a verdict directed for the other party stands as would the finding of a jury, for the same party, in the absence of any direction, * * *. All the controverted facts and all inferable facts in support of the judgment will be deemed conclusively established in favor of the party for whom the verdict was directed." *Thompson v. Simpson* (1891), 128 N. Y. 270, 283, 28 N. E. 627, 630.

Appellant insists that the evidence does not show negligence on its part. There is evidence in the record tending to show that no gong was sounded or

2. signal of any kind given by appellant before it ran one of its cars against appellee's wagon. The evidence also showed that the car ran with such force against appellee's wagon as to leave one-half of it on the west side of the track, forty feet from the place where the collision occurred, and the other half, with the mules attached, was found on the east side of the track. Appellee was thrown fifty feet from the place

of collision and the car ran about 100 feet after the collision occurred before it was stopped. The headlights were the same as used on the city cars, but were insufficient for cars running in the locality where there were no street lights. At that crossing persons intending to board the cars would strike matches to stop the cars, and, when standing at the crossing and looking at an approaching car, it was impossible to ascertain how far away it was at any time. Appellee testified that he drove his wagon east to the turn of Forty-fifth street where it intersects Pennsylvania street, then turned his wagon to the right and drove south fifty feet and crossed at the regular Forty-fifth street crossing. He looked south "to see if a car was approaching when he first reached Pennsylvania street which was just as he turned south, and before he crossed the track he again looked north. He saw no car coming and no lights, and heard no gong or other signal." One witness testified that the night was dark and he saw the headlight but he could not tell how far it was from the crossing. Appellee's mules and a portion of the wagon had passed over the crossing when the collision occurred, and appellee at the time was carrying a lighted lantern in his left hand on his left knee.

This, together with the other evidence introduced at the trial, is sufficient to warrant the conclusion that appellant was negligent; that appellee was free from negligence, and that the proximate cause of appellee's injury was the negligence of appellant in failing to give any warning signal of its approach, operating the car without a proper light, and with such speed as to cut through appellee's wagon and then run a distance of approximately 100 feet after the collision before the car was brought to a stop. If the car had been equipped with a better light, or if it had been running slower, and a warning signal given when approaching the cross-

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ing, appellee might have passed over the crossing without injury, but these were all questions of fact for the consideration of the trier of the facts, and they have all been determined against appellant. We are unable to say as a matter of law that there is no evidence to support the court's finding.

It is also contended that the court erred in submitting the question of the amount of appellee's damages to the jury after the instruction had been given

3. directing a verdict for appellee. There seems to be authority supporting the practice adopted by the trial court in cases of unliquidated damages. *Murch Bros., etc., Co. v. Johnson* (1913), 203 Fed. 1, 121 C. C. A. 353. Furthermore, appellant was not harmed by this procedure and is in no position to complain. The bill of exceptions shows that there was no objection made at the time to this question being left to the jury, nor was there any objection after the jury retired, nor at any time before the verdict was returned, and no claim of error was made by appellant until the motion for a new trial was filed.

Where a party to a suit consents to the method of procedure adopted by the trial court and makes no objection and reserves no exception at the proper time, he cannot be heard to complain afterwards in this court. *Houk v. Citizens' Nat. Bank* (1912), 51 Ind. App. 628, 99 N. E. 437; *Merchants' Nat. Bank v. Nees* (1916), 62 Ind. App. 290, 110 N. E. 73, 76, 112 N. E. 904.

The evidence in this case on the question of appellee's contributory negligence is not such as requires us to say that he was guilty of contributory negli-

4. gence as a matter of law. Inferences may very properly be drawn from the evidence which will support the decision of the court, and in such case this court will not reverse on the ground of insufficiency of

the evidence. *Bright Nat. Bank v. Hartman* (1915), 61 Ind. App. 440, 109 N. E. 846, 850.

We are satisfied, therefore, that the evidence was not such as required the court to hold as a matter of law that appellee was guilty of contributory negligence, or that appellant's negligence was not the proximate cause of appellee's injury. On the other hand, we believe that the evidence and the facts to be legitimately inferred therefrom warranted the court in directing a verdict for appellee.

Other kindred questions are discussed by appellant, but as none of them, in any event, would change the result announced, we deem it unnecessary to extend this opinion.

Judgment affirmed.

NOTE.—Reported in 117 N. E. 673. See under (1) 4 C. J. 903; (2) 36 Cyc 1600, 1605.

HEDGES v. MEHRING ET AL.

[No. 9,246. Filed March 14, 1917. Rehearing denied June 20, 1917. Transfer denied November 13, 1917.]

1. JUDGMENT.—*Joint.—Conclusiveness.—Parties to Note.*—In a suit on a note against several defendants alleged to be liable to plaintiff, in the absence of issues formed between such defendants, a joint judgment in favor of the plaintiff against all defendants is conclusive only as to their joint liability to plaintiff, and leaves unadjudicated their rights as between themselves. p. 594.
2. PLEADING.—*Answer.—Cross-complaint.—What Constitutes.*—In an action on a note against several defendants, a pleading filed by part of the defendants setting up facts to show that they indorsed the note in due course of business after negotiation, and that another defendant was the original maker, and which sought to have her property first exhausted to satisfy any judgment that might be rendered on the note, is a cross-complaint, though denominated an answer. p. 594.
3. PROCESS.—*Service.—Necessity.—Cross-Complaint.*—In an action against several defendants on a note, where the question of suretyship is presented by several defendants by cross-com-

plaint, such issue may be determined at the trial of the principal cause, as to all parties in court on the complaint, without new process issued on the cross-complaint, it being the duty of such parties to take notice thereof without summons, and where they actually participate in the trial of the case, either with or without answer to the cross-complaint, they are bound by the judgment thereon. p. 595.

4. **APPEAL.—Review.—Theory of Case.**—The court on appeal will look to the whole record to determine the theory upon which a case was tried and disposed of in the lower court. p. 597.

PLEADING.—Cross-Complaint.—Failure to Answer.—Waiver.

—In an action against several defendants on a note, where defendant indorsers sought by cross-complaint, to which no answer was filed, to charge the remaining defendant with being primarily liable, and the trial court and the parties proceeded on the theory of determining the rights of the defendants as between themselves as well as their liability to the holder, the indorsers by so proceeding waived answer to their cross-complaint, and it will be regarded on appeal as having been put at issue by an answer of general denial. p. 597.

6. **BILLS AND NOTES.—Actions.—Judgment.—Liability of Defendants.—Presumption.**—Until the question of suretyship is judicially determined all defendants to a judgment on a note are deemed primarily liable, and cannot claim the statutory rights of sureties. p. 598.
7. **JUDGMENT.—Issues.—Conclusiveness.—Presumptions.**—Everything which might have been determined under the issues in a case will be presumed to have been adjudicated. p. 598.
8. **JUDGMENT.—Erroneous Judgment.—Collateral Attack.**—Where a question is once litigated by the parties, the judgment rendered, though erroneous, cannot be amended or impaired in a collateral attack. p. 599.
9. **BILLS AND NOTES.—Rights of Sureties.—Statute.—Construction.**—Although §1269 Burns 1914, §1212 R. S. 1881, providing for the determination of issues between sureties joined as defendants speaks of sureties only, the statute is remedial in character and should receive a liberal construction. p. 599.
10. **JUDGMENT.—Conclusiveness.—Collateral Attack.**—Where the holder of a note brought action thereon in which an indorser primarily liable as surety and indorsers in due course of business after negotiation were made defendants, and, the issue of suretyship having been presented by cross-complaint filed by the indorsers in due course of business, the trial proceeded on the theory of determining the rights of the defendants as between themselves, and a judgment, from which no appeal was

taken, was rendered against all of them without distinction, the indorsers secondarily liable could not, in a subsequent action by the indorser as surety to enforce contribution after she had paid the judgment, deny liability. p. 600.

From Marion Circuit Court (26,643); *Louis B. Ewbank*, Judge.

Action by Jennie R. Hedges against Orval E. Mehring and others. From a judgment for defendants, the plaintiff appeals. *Reversed*

William F. Elliott and *Harmon J. Everett*, for appellant.

C. E. Fenstermacher and *F. J. Doudican*, for appellees.

FELT, C. J.—This is a suit by appellant against appellees for contribution.

The errors assigned are the overruling of each of appellant's separate demurrers to the second paragraph of each of the separate answers of the appellees; overruling appellant's motion for a new trial.

Appellant filed her complaint against appellees in which she alleges in substance that on March 4, 1911, one Harry J. Milligan filed in the Marion Superior Court his complaint against her and Thomas J. Endsley, P—— H. Hill, Orval E. Mehring and William J. Cline, Jr., to recover on a promissory note purporting to have been signed by Thomas J. Endsley and appellant and payable to P. H. Hill for the sum of \$750, with interest and attorney's fees, and to have been indorsed by appellees; that appellant filed an answer in which she alleged that she did not sign the note in suit, and also filed a cross-complaint against all of the other parties to the suit in which she alleged in substance that the note sued on was not her obligation, and asked that the same be declared void and be canceled; that appellees Mehring and Cline each filed answers to the complaint in which each alleged that the

note was negotiable and that he purchased it before maturity, in the due course of business; that Endsley and Hedges were principals on the note and that appellees were sureties only, and asked that the property of appellant and Endsley be first exhausted before levying upon their property; that appellees answered the cross-complaint by a general denial; that Milligan answered the cross-complaint by three paragraphs of answer; that thereupon appellant applied for and obtained a change of venue to the Hancock Circuit Court; that the case was tried on the issues aforesaid and the jury returned a verdict for the plaintiff against Cline and Mehring only; that a new trial was granted; that appellant filed an additional verified answer in which she also denied that she ever received any of the consideration for which the note was executed; that Milligan replied thereto by alleging that the note was negotiable and payable at a bank in this state and was purchased by him in the due course of business for a valuable consideration before maturity and was duly indorsed; that appellant had acknowledged signing the note and he relied thereon. Cline and Mehring filed an additional pleading in which they alleged that appellant was estopped to avail herself of an answer of *non est factum*; that the cause was again submitted to a jury for trial on all the issues formed and upon "the issues formed on the answer of Mehring and Cline to the effect that they should be found sureties only and the answer of denial thereto by Jennie R. Hedges"; that the jury returned into court the following verdict:

"Harry J. Milligan

vs.

Jennie R. Hedges

Orval E. Mehring &

William Cline

"We, the jury, find for the plaintiff and against all the defendants and assess his damages at Nine-

Hundred Dollars (\$900.00), which included Seventy-five Dollars (\$75.00) attorney fees. William J. Eib, Foreman."

That on June 8, 1912, judgment was rendered on the verdict as follows: "It is therefore considered and adjudged by the Court that the plaintiff recover of and from the defendant herein the sum of Nine Hundred (\$900.00) Dollars, which includes the sum of Seventy-five (\$75.00) Dollars attorney's fees, rendered herein, as his damages heretofore assessed by the jury herein, together with the costs of this action by him laid out and expended taxed at \$——. It is further considered and ordered by the Court that this judgment is collectable without relief from valuation and appraisements laws,' which verdict and judgment is equally against all the defendants and makes each severally and jointly liable for the payment and finding against Mehring and Cline on their cross-complaint asking to be found sureties only, and that Mrs. Hedges be exhausted before they should be required to pay, and said judgment remains unappealed from and in full force and effect as against said Mehring and Cline on said issue."

That said verdict and judgment is equally against all the defendants and makes each severally and jointly liable for the payment and is a finding against "Mehring and Cline on their cross-complaint asking to be found sureties only, and that Mrs. Hedges be exhausted before they should be required to pay, and said judgment remains unappealed from and in full force and effect as against said Mehring and Cline on said issue."

It is averred that Mehring and Cline requested the clerk of the Hancock Circuit Court to issue execution against appellant, which was accordingly done, and her property was levied upon and sold for \$992.35 to pay and satisfy the judgment aforesaid; that thereafter she

redeemed her property from such sale, and in so doing was compelled to and did pay the sum of \$1,031.11; that thereafter she demanded from each of appellees payment of the one-third amount of said judgment and each refused payment.

A demurrer to the complaint for insufficiency of facts to state a cause of action was overruled. Each of the appellees filed a separate second paragraph of answer, which in substance alleged that on August 27, 1909, appellant and Thomas J. Endsley executed to one P. H. Hill their promissory note due eight months from date for the sum of \$750 and attorneys fees, negotiable and payable at the Peoples State Bank of Indianapolis, Indiana; that before maturity, for a valuable consideration, said Hill sold and indorsed said note to William J. Cline, Jr., who thereafter in like manner sold and indorsed the same to Orval E. Mehring; that thereafter in the due course of business, and before the maturity of the note, Mehring sold and indorsed the same to Harry J. Milligan for a valuable consideration, a copy of which note and the several indorsements are set out and made a part of the answer; that the makers of said note, Jennie R. Hedges and Thomas J. Endsley, failed and refused to pay the same when due. The answer then alleges in detail the proceedings by which Milligan obtained judgment on the note; that to Milligan's complaint appellant filed an answer of *non est factum*; that Mehring and Cline filed a general denial to the complaint and each filed a second paragraph of answer in which it was alleged that the note was purchased in the regular course of business before maturity, in good faith, for a valuable consideration, and duly transferred by indorsement before maturity of the note to the plaintiff, Milligan, who should be compelled to first exhaust the property of the makers of said note before levying on their property; that "no answer or reply was filed

to said second paragraph of answer;" that before the trial, Milligan dismissed the suit as to Thomas J. Endsley and P. H. Hill; that the case was submitted to a jury for trial on the issues so joined and the jury at the close of the trial returned into court a general verdict against all the defendants in the sum of \$900; that the jury also returned with their general verdict answers to interrogatories in which they found that Jennie R. Hedges executed the note in suit, and that subsequently thereto Cline and Mehring, before maturity, for a valuable consideration, purchased the note in the regular course of business, and in like manner sold and indorsed the same to Milligan; that the court rendered judgment on the verdict against all the defendants for \$900, which "verdict and judgment was the only verdict and judgment rendered in said cause, and the said verdict and judgment is the same verdict and judgment referred to in plaintiff's complaint herein."

The demurrer to the special answer was on the ground that it does not state facts sufficient to constitute a cause of defense. The memoranda states in substance that both complaint and answer show that the judgment was joint against all of the defendants, the effect of which was to adjudge them each and all equally liable; that the only new fact alleged in the answer is the absence of a reply to the special answer of Cline and Mehring; that going to trial without such reply waived it; that the judgment rendered embraces not only what was actually determined, but every other matter which the parties might have litigated in the cause.

The appellant also filed a special reply to the second paragraph of special answer of each of the appellees in which she set up a history of the execution and transfer of the note and the suit thereon and a part of the instructions of the court in which the court set out the substance of the aforesaid second paragraph of the an-

swer of appellees and the prayer thereof as follows: "Wherefore, the defendants, Orval E. Mehring and William Cline, pray that the makers of said note be required to pay the same, and the judgment rendered in this cause," and also instructed the jury that "under the issues thus formed on the complaint and answer thereto and the replies to the answers, are formed the issues which you are to try and determine."

It is also charged in the special reply that the issue presented by the special answer or cross-complaint of Cline and Mehring of their secondary liability "was deemed and taken as a question properly before the court, and jury, being adjudicated and determined"; that among the interrogatories submitted to the jury was the following: "No. 10. Did the defendant, Jennie R. Hedges, sign the note in suit and did P. H. Hill thereafter and upon the faith thereof accept her as surety on said note? Ans. Yes."

Upon the trial it was agreed that appellant had paid the judgment; that she had made due demand for reimbursement from each of the appellees before filing this suit and that they refused to pay her any amount whatever.

Appellant's brief also contains the following, which is unquestioned by appellees, viz.: "The following parts of the record in the case of *Milligan v. Endsley et al.*, No. 12145, in the Hancock Circuit Court, were placed in evidence, which includes all the pleadings filed in said cause, the plea of suretyship filed by appellees and included the instructions of the Court given to the jury in the second trial of said cause, designated as No. 9; the interrogatories and answers thereto in the second trial, and the verdict of the jury; the judgment and finding of the Court, and the proceedings on the first trial, as set out in the second special paragraph of (appel-

lant's) reply to the second paragraph of answer by appellees. * * *

This was all the evidence in the trial of the cause."

In a suit upon a note against several defendants alleged to be liable thereon to the plaintiff, in the absence of issues formed between such defendants, a

1. joint judgment in favor of the plaintiff against all of such defendants is conclusive only as to the joint liability of such defendants to the plaintiff, and leaves unadjudicated the rights of such defendants as between themselves. *Dewitt v. Boring* (1890), 123 Ind. 4, 23 N. E. 1085; *Knopf v. Morel* (1887), 111 Ind. 570, 573, 13 N. E. 51; *Westfield Gas, etc., Co. v. Noblesville, etc., Gravel Road Co.* (1895), 13 Ind. App. 481, 483, 41 N. E. 955, 55 Am. St. 244; *Bulkeley v. House* (1893), 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247, 254.

Appellant and appellees do not differ materially as to the law of contribution as established by text-writers and the decided cases. 3 Pomeroy, Eq. Jurisp. §1418; Sheldon, Subrogation (2d ed.) §140 *et seq.*, §§181, 182; *Norris v. Churchill* (1898), 20 Ind. App. 668, 670, 51 N. E. 104; *Knopf v. Morel*, *supra*; *Githens v. Kimmer* (1879), 68 Ind. 362; *Houck v. Graham* (1886), 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; *Warring v. Hill* (1883), 89 Ind. 497. The chief difficulty in this case arises in applying the law to the peculiar facts of this case, and the parties differ widely as to the effect of the pleadings, procedure, verdict, and judgment in the suit brought by Milligan.

The special answer of appellees, in which they allege facts to show that they were indorsers of the note in due course of business, after it had been ne-

2. gotiated and transferred by the payee, and that appellant was liable as an original maker, and by which they sought to have her property exhausted before levying upon their property to satisfy any judg-

ment that might be rendered on the note in favor of the plaintiff, sought affirmative relief against appellant and, though in name an answer, was in fact a cross-complaint. *Newton v. Pence* (1894), 10 Ind. App. 672, 674, 675, 38 N. W. 484; *Heaton v. Lynch* (1894), 11 Ind. App. 408, 410, 38 N. E. 224; *Browning v. Merritt* (1878), 61 Ind. 425, 428; *Wright v. Anderson* (1889), 117 Ind. 349, 20 N. E. 247; *Bass v. Smith* (1878), 61 Ind. 72, 74.

No process was issued against appellant on the cross-complaint of appellees in the original suit, and she filed no answer or other pleading thereto, but the record shows that the issue raised by the cross-complaint was submitted to and tried by the jury without objection as well as the issue of the liability of the defendants to the plaintiff presented by the complaint.

Section 1269 Burns 1914, §1212 R. S. 1881, provides: "When any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined upon the issue made by the parties at the trial of the cause, or at any time before or after the trial, or at a subsequent term; but such proceedings shall not affect the proceedings of the plaintiff."

While the question of suretyship may be put in issue and be tried and determined at the trial of the principal cause, or before or after such trial, and the ques-

3. tion does not necessarily affect the case of the plaintiff, yet as to all parties who are in court on the complaint, where the issue presented by the cross-complaint is related to the subject-matter of the complaint, it has been held that such parties need not have process served upon them to appear and answer such cross-complaint, and that it is the duty of the par-

ties so in court to take notice thereof without further summons or notice, and where they actually participate in the trial of the case, either with or without an answer to such cross-complaint, they are bound by the judgment rendered thereon. *Bevier v. Kahn* (1887), 111 Ind. 200, 12 N. E. 169; *Bowman v. Citizens' Nat. Bank* (1900), 25 Ind. App. 38, 46, 56 N. E. 39; *Lewis v. Bortsfield* (1881), 75 Ind. 390, 393; *Jenkins v. Newman* (1890), 122 Ind. 99, 102, 23 N. E. 683; *Eisman v. Whalen* (1906), 39 Ind. App. 350, 355, 79 N. E. 514, 1072; *Montgomery v. Vickery* (1887), 110 Ind. 211, 11 N. E. 38; *Thompson v. Harlow* (1897), 150 Ind. 450, 452, 50 N. E. 474; *Clements v. Davis* (1900), 155 Ind. 624, 631, 57 N. E. 905.

Lewis v. Bortsfield, *supra*, was a partition suit in which one of the defendants filed a cross-complaint in which she alleged that she was the owner in fee of an undivided interest in the real estate, and prayed for partition thereof. There was no summons on the cross-complaint and no appearance or answer thereto by one of the defendants, and on appeal it was contended by such defendant, the appellant in the Supreme Court, that the judgment was not binding upon him because there was no appearance to or issue upon the cross-complaint, and the court in disposing of the question said: "It is clear that appellant's failure to answer, or join issue upon, the cross-complaint of Susannah Goings, affords him no ground for the reversal of the judgment below; after trial, without objection on that ground, although no answer was filed to the cross-complaint, it will be regarded and held, on appeal, as if an answer in denial had been filed. *Casad v. Holdridge*, 50 Ind. 529; *Purdue v. Stevenson*, 54 Ind. 161; *Bass v. Smith*, 61 Ind. 72. Nor will the alleged fact, that there was no appearance by appellant to the cross-complaint, afford him any ground for the reversal of

the judgment. He appeared fully in the action, as shown by the record, both before and after the filing of the cross-complaint, and was bound therefore, to take notice of the cross-complaint, without the issue and the service of process thereon. It is only where one of two or more defendants, after personal service, makes default in the original action, and another defendant files a cross-complaint, setting up new matter not apparent on the face of the original complaint, that the defaulting defendant must be served with process issued on such cross-complaint, before any judgment by default can be taken or rendered against him on such cross-complaint."

In *Bowman v. Citizens' Nat. Bank*, *supra*, this court reviewed the decisions on the subject of a cross-complaint against parties already in court and applied the rule stated in *Lewis v. Bortsfeld*, *supra*, to the question of suretyship where the parties were present at the trial and held that the court had jurisdiction to determine the issue presented by the cross-complaint, although no process was issued thereon and no answer was filed thereto.

An appellate court will look to the whole record to determine the theory upon which a case was tried and disposed of in the lower court. *Blanchard, etc.*,

4. *Furniture Co. v. Colvin* (1903), 32 Ind. App. 398, 402, 69 N. E. 1032; *Hobbs v. Town of Eaton* (1906), 38 Ind. App. 628, 630, 78 N. E. 333; *Shew v. Hews* (1891), 126 Ind. 474, 476, 26 N. E. 483.

The trial court and all the parties having proceeded on the theory of determining the rights and liabilities of the defendants to Milligan's suit as between

5. themselves as well as the liability of such defendants to the plaintiff, the appellees in this appeal by so proceeding without objection or motion to the contrary will be held to have waived an answer by

appellant to their cross-complaint against her, and the same will be considered at issue by the general denial which the law directs to a pleading under such conditions. *Buchanan v. Berkshire Life Ins. Co.* (1884), 96 Ind. 510, 516; *Helm v. First Nat. Bank* (1883), 91 Ind. 44, 47; *Hose v. Allwein* (1883), 91 Ind. 497, 501; *Johnson v. Briscoe* (1884), 92 Ind. 367; *Smith v. McDonald* (1911), 49 Ind. App. 464, 467, 97 N. E. 556.

Until the question of suretyship is judicially determined all defendants to the judgment are deemed primarily liable to the plaintiff and cannot claim

6. the statutory rights of sureties until they have obtained an adjudication thereof in their favor.

Bowman v. Citizens' Nat. Bank, supra, 47; *Knopf v. Morel, supra*; *Voss v. Lewis* (1890), 126 Ind. 155, 157, 25 N. E. 892; *Oglebay v. Todd* (1905), 166 Ind. 250, 254, 76 N. E. 238.

The general verdict finds all the defendants, appellant and appellees, equally and jointly liable without any distinction, modification, or conditions as to whose property should be first exhausted. The judgment is properly in accordance with the verdict. There was no motion to have the jury find specifically on the issue of the cross-complaint, to modify or change the judgment, for a new trial or for a *venire de novo*.

The rule is well established that everything which might have been determined under the issues in a cause will be presumed to have been adjudicated.

7. *Mitten v. Caswell-Runyan Co.* (1912), 52 Ind. App. 521, 526, 99 N. E. 47, and cases cited. *Kilander v. Hoover* (1887), 111 Ind. 10, 14, 11 N. E. 796; *McBurnie v. Seaton* (1887), 111 Ind. 56, 59, 12 N. E. 101.

Appellees by their cross-complaint brought into the original case the issue between them and appellant, and the record shows that such issue was actually

8. submitted to and tried by the jury. The question comes to us in this case not simply as one which might have been determined under the issues, but one which was actually an issue in the case, submitted to and tried by the jury. The judgment rendered makes all the defendants equally and jointly liable for the debt. It remains unmodified and no appeal was taken from it. Where a question is once litigated by the parties, the judgment rendered, though erroneous, cannot be amended or impaired in a collateral attack. The case is readily distinguishable from those suits where the issues tried deal only with the liability of the defendants to the plaintiff, and where no issue of suretyship between the defendants is presented or tried. *Montgomery v. Vickery, supra; Mitten v. Caswell-Runyan Co., supra; Kilander v. Hoover, supra.*

While the statute, *supra*, speaks of sureties only, it is remedial in character and should receive a liberal construction to advance the remedy the legisla-

9. ture intended to provide for all those who came within the purview of the act. On principle it would seem that it should apply to all cases where some of the defendants are primarily liable and others only secondarily liable, but it is a statutory right and ordinarily is available only to those who come within the purview of the act. Whether the language of the statute is broad enough to warrant the general rule that one who is a regular indorser of paper after it is in circulation may avail himself of the remedy provided by the statute, over the objection of other defendants to the suit, we need not decide, for, as above indicated, appellants brought the issue into the case, and it was actually tried without objection by any one. Having presented the issue and it having been tried, they cannot in a collateral attack or on appeal avoid the effects of such adjudication. As bearing on the interpreta-

tion and application of the statute see the following: *Lacy v. Lofton* (1866), 26 Ind. 324; *Core v. Wilson* (1872), 40 Ind. 204, 208; *Harshman v. Armstrong* (1873), 43 Ind. 126, 132; *Nurre v. Chittenden* (1877), 56 Ind. 462, 464; *Williams v. Fleenor* (1881), 77 Ind. 36; *Bowman v. Citizens' Nat. Bank, supra*; *Clements v. Vanausdall* (1913), 180 Ind. 490, 494, 103 N. E. 343; *Porter v. Huie* (1910), 94 Ark. 333, 126 S. W. 1069, 28 L. R. A. (N. S.) 1039, notes; Sheldon, Subrogation (2d ed.) §§181, 182; 1 Daniels, Negotiable Instruments (6th ed.) §§703, 703a, 704; *Altoona, etc., Bank v. Dunn* (1892), 151 Pa. 228, 25 Atl. 80, 31 Am. Dec. 742, 745, and notes.

The record in this case presents an anomalous situation. It indicates that appellant was primarily liable as surety on the note sued upon by Milligan and

10. that appellees were regular indorsers. The instructions and interrogatories clearly indicate that the issues of appellees' cross-complaint were submitted to and tried by the jury. The judgment rendered did not give to appellees the relief they were entitled to obtain, but the issues presented the question of their rights, and, having been once tried and determined, they cannot be again litigated. *Armstrong v. Harshman* (1878), 61 Ind. 52, 54, 28 Am. Rep. 665. To attempt to do so in this suit would be a collateral attack on that judgment and would be unavailing. The judgment in the former case should have covered the question of appellees' secondary liability, as against appellant, but it does not do so, and we must accept it as it is. *Starkey v. Starkey* (1905), 166 Ind. 140, 142, 76 N. E. 876. From this it follows that under the judgment rendered in the original suit appellant and appellees are primarily liable, and payment of the judgment by appellant entitled her to enforce contribution against appellees.

The facts stated in the special answer do not constitute a defense to appellant's cause of action, and the court erred in overruling appellant's demurrers to the second paragraph of the answer of each of the appellees to her complaint.

The judgment is reversed, with instructions to sustain appellant's motion for a new trial, to sustain the demurrers aforesaid, and for further proceedings not inconsistent with this opinion.

Ibach, P. J., Dausman, Caldwell, Batman and Hottel, JJ., concur.

NOTE.—Reported in 116 N. E. 433.

ALLEN ET AL. v. POWELL.

[No. 9,523. Filed February 23, 1917. Rehearing denied June 29, 1917. Transfer denied November 13, 1917.]

1. **NEW TRIAL.**—*Motion for.*—*Time for Filing.*—*Statute.*—Under §587 Burns 1914, Acts 1913 p. 848, providing that application for a new trial may be made at any time within thirty days from the time the verdict or decision is rendered, but, if the term of court is adjourned before the expiration of the thirty-day period, the motion may be filed in the office of the clerk of the court, and not afterwards, where the term at which judgment was rendered adjourned and a new term convened within the thirty-day period, the motion for new trial was properly filed with the court, the proviso for filing with the clerk applying only when the motion is filed during vacation and within the thirty days allowed by the statute. p. 604.
2. **EVIDENCE.**—*Res Gestae.*—In an action to quiet title, where plaintiff claimed that her grantee wrongfully obtained possession of the deed, which was signed and acknowledged but blank as to the grantee, and inserted his own name in the blank left for that of the grantee, plaintiff was properly permitted to testify to statements made by such grantee, in the absence of defendants, on the occasion of her visit to his office to discuss a proposed sale of the land by him for her, such statements being *res gestae*. p. 609.
3. **TRIAL.**—*Instructions.*—*"When."*—In an action to quiet title, where plaintiff contended that her grantee wrongfully procured

the deed and inserted his name as grantee, an instruction that the burden was on grantee to prove her contention, "but when she has done so, no other person can gain any rights" under the deed, is not erroneous as assuming that plaintiff had sustained the burden of proof, the word when being used in the sense of "provided," or "if." p. 610.

4. **DEEDS.—Delivery.—Wrongful Possession.**—Where one steals a deed to land and wrongfully inserts his name as grantee, there is no delivery. p. 612.
5. **DEEDS.—Delivery.**—Where the owner of land voluntarily left a deed, which was properly signed and acknowledged but blank as to the grantee, in her agent's possession so that he might hold it for her until the abstracts were examined, and a conveyance might be subsequently completed by her, there was no delivery to the agent. p. 612.
6. **DEEDS.—Delivery.—Wrongful Possession.**—A writing in the form of a deed that passes into the possession of the named grantee without the knowledge, consent, or acquiescence of the grantor, and with no intent to deliver it, is ineffectual to pass title to the grantee. p. 612.
7. **ESTOPPEL.—Estoppel by Silence.**—A person may be estopped by his silence, where it is his duty and there is opportunity for him to speak, or by his passivity where an obligation and an opportunity to act exists, but he must have knowledge of the facts and his rights. p. 614.
8. **ESTOPPEL.—Estoppel by Acquiescence.**—In an action to quiet title, where it appeared that plaintiff executed a deed, which was blank as to the grantee, and left it with her agent, who wrongfully filled in his own name and sold the land, the situation was sufficient to present an issue for the jury as to whether plaintiff was estopped by her conduct in not immediately asserting her rights to deny the validity of the deed as against innocent purchasers who acquired title subsequently to her discovery of the agent's action. p. 614.
9. **ESTOPPEL.—Equitable Estoppel.**—Where one of two innocent persons, each guiltless of an intentional moral wrong, must suffer a loss occasioned by the wrongful conduct of another, the loss must be borne by him whose conduct enabled the injury to be inflicted. p. 614.
10. **ESTOPPEL.—Estoppel by Laches.**—Where a person named as grantee in a deed, of which there is no legal delivery, wrongfully obtains possession of it and causes it to be recorded, the grantor, on acquiring knowledge of the facts, is required to act promptly to prevent innocent third persons from acting to their prejudice in relying on the record, and by failing to do

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so such grantor will be estopped by laches from asserting his title against an innocent purchaser. p. 615.

11. **ESTOPPEL.—Burden of Proof.**—One relying on estoppel has the burden of establishing all the facts necessary to constitute it. p. 616.
12. **ESTOPPEL.—Estoppel by Laches.—Burden of Proof.—Instruction.**—In an action to quiet title, where it appeared that grantor knew that she had not delivered the deed therefor, but that her grantee had fraudulently procured such deed and, after inserting his own name as grantee, had it recorded, and she remained inactive for several weeks after acquiring full knowledge of the facts, during which time conveyance was made to innocent purchasers, who relied on the record, such facts were sufficient *prima facie* to constitute estoppel, and the burden was upon the grantor to show any mitigating facts and circumstances to avoid the estoppel, so that an instruction that the burden was on the innocent purchasers to prove that there was no such mitigating circumstances was erroneous. p. 616.

From Johnson Circuit Court; *William E. Deupree*, Judge.

Action by Malvina Powell against Oscar N. Allen and others. From a judgment for plaintiff, the defendants appeal. *Reversed.*

Remy & Berryhill, for appellants.

Bingham & Bingham, for appellee.

CALDWELL, J.—The appellee brought this action in the Superior Court of Marion county, to quiet her title to lots Nos. 28, 29, 30, 31, 32, 33, 34, 35 and 36 in the Crestline addition to the city of Indianapolis. The complaint is in two paragraphs, the first declaring on a legal title, and the second on an equitable title. The Allens disclaimed. Appellants Clarence H. and Mary E. Beard and Mary J. Glynn answered by general denial. The cause was venued to the Johnson Circuit Court, where a trial resulted in a verdict and judgment for appellee, quieting her title as prayed. The errors presented and discussed arise on the overruling of the motion for a new trial.

A preliminary matter must be considered: Appellee insists that the motion for a new trial was not filed as required by the statute, and that as a conse-

1. quence, appellants cannot be heard to complain of the court's action in overruling it. The statute as amended in 1913 governs. Acts 1913 p. 848, §587 Burns 1914. The statute is in substance that an application for a new trial may be made at any time within thirty days from the time when the verdict is rendered, there being a proviso that if the term of court is adjourned before the expiration of such period, the motion may be filed in the clerk's office within such period, but not afterwards. The facts are as follows: The verdict was returned at the February term, 1914, of the trial court. At the March term and within the thirty-day period appellants applied for a new trial in the usual manner by presenting and filing the motion in open court. Appellee contends that, notwithstanding that the interim between the two terms had passed, and although court had convened for the March term, appellants were authorized to file the motion only in the clerk's office, and that the presenting and filing of it in open court, it not having theretofore been filed in the clerk's office, was without warrant of law.

Since 1881, and prior to the amendment of 1913, the period of time within which an application for a new trial might be made depended somewhat on the length of the term of court at which the verdict or decision was rendered, and the extent of the vacation immediately subsequent thereto. The duration of the terms of court and of intervening vacations is not uniform in the various circuits or in many instances in the same circuit, certain terms and vacations in any year being longer than others. It resulted under such prior statutes that there was a lack of uniformity in the length of the period within which a party litigant might apply for a

new trial. We think it apparent that the legislative purpose that actuated the amendment of 1913 was a reduction of the practice to uniformity in the matter indicated, to the end that litigation might thereby be expedited and moved to its conclusion. Hence the establishing of the thirty-day period.

A statute yet in force, and which governs in the ordinary application for a new trial, provides that "the application must be by motion upon written causes filed at the time of making the motion." §562 R. S. 1881, §588 Burns 1914. Under such statute, and the statutes in force prior to the amendment of 1913 fixing the time within which an application for a new trial might be made, it was held that a motion for a new trial must be presented to and entered by the court, and that the mere filing of it with the clerk was not sufficient. *Emison v. Shephard* (1889), 121 Ind. 184, 22 N. E. 883; *Levey v. Bigelow* (1893), 6 Ind. App. 677, 34 N. E. 128. Such statutes authorized an application for a new trial only in term time. It is therefore apparent under such statutes as interpreted that a requirement that the motion be presented to the court deprived a party litigant of none of his rights. But, as we have indicated, the amendment of 1913 fixes a definite time limit within which such application must be made, or not at all. Under the amendment all the thirty-day period is available. But the whole or a substantial part of the period may fall in vacation. Under such circumstances to require that the motion be presented to the court would in some instances entirely and in other instances very materially limit the rights of a party desiring to move for a new trial, as otherwise fixed by the amendment, and hence the necessity for the provision that, if the term of court has adjourned before the expiration of the thirty-day period, the motion may be filed in the clerk's office within such period. The thirty-day pe-

riod may be entirely included in the term at which the verdict or decision is rendered, or it may extend into the succeeding vacation, or it may reach across such vacation into the succeeding term. The proviso of the amendment does not purport to apply to the first case. Literally, such proviso may be broad enough to cover the second and third cases. Such a broad interpretation, however, is not necessary in order that full effect may be given to the evident legislative purpose that all the thirty-day period be available to the party moving for a new trial. Where all the period limited comes within the term at which the verdict or decision is rendered, the application should be made to the court. Where a part of such period extends into the succeeding vacation, the application, if made at such term, should be made to the court; if made in that part of the period that falls in vacation, the motion may be filed in the clerk's office as specified by the amendment. If the thirty-day period extends into the succeeding term, the application, if made at such term but within such period, should be made to the court. Such a holding gives full effect to the amendment of 1913, construed in the light of the legislative purpose that gave rise to it, and also gives effect to §588, *supra*, as construed by the courts, modifying it only to the extent necessary to carry out such legislative purpose. It follows that the application for a new trial here was made in the proper manner, and that the ruling on the motion is before us for review.

An understanding of the questions presented and discussed under the motion for a new trial necessitates a statement of the facts. The material part of the evidence is substantially as follows: On and prior to July 21, 1913, appellee was the owner of the lots described in the complaint. On July 22, 1913, an instrument purporting to have been signed and acknowledged by ap-

pellec, and purporting also to convey the lots from appellee to Crawford, was recorded in the recorder's office of Marion county. Such instrument is the deed hereinafter described as having been signed and acknowledged by appellee in blank as to the grantee. The evidence respecting the subsequent apparent conveyances of the lots as disclosed by the deeds of record in the recorder's office consisted of an agreed stipulation at the trial not entirely clear in its provisions, but to the following effect: July 28, 1913, recorded July 29, 1913, Crawford to Allen, all the lots; August 26, 1913, recorded August 27, 1913, Allen and Mary N. Allen, his wife, to Beard, all the lots; August 30, 1913, recorded September 4, 1913, Beard and Mary E. Beard, his wife, to Mary J. Glynn, describing part of the real estate in controversy; August 30, 1913, recorded September 5, 1913, Beard and wife to Josephine Fickle, lot No. 31. Appellee commenced this action September 6, 1913, and on that day duly filed *lis pendens* notice. The stipulated agreement respecting apparent conveyances and the proceedings affecting the lots subsequently to September 6, 1913, was in substance as follows: September 23, 1913, recorded November 6, 1913, Beard and wife to Harry C. Gauker, lots Nos. 32, 33, 34, 35 and 36. September 10, 1913, Mary E. Beard commenced an action against Gauker and wife to establish and foreclose a purchase-money lien against the lots last named, and duly filed a *lis pendens* notice. Fickle and the Gaukers were not made parties to this proceeding. The evidence, at least inferentially, establishes that no one actually occupied the lots and that actual possession did not follow any of the conveyances.

Appellee lived at Newcastle. Crawford maintained an office at Indianapolis, where he was doing business as the Crawford Land Company. Appellee was not acquainted with him. Through an advertisement she got

into communication with him, resulting in his informing her by letter that he had a purchaser for the lots at \$8,000. By arrangement with him, she came to his office July 21, 1913, for the purpose of consummating the sale and conveyance of the lots to the unknown purchaser. Prior thereto by direction of Crawford, she had caused abstracts of title to the lots to be brought down to date. She also caused a warranty deed, blank as to the grantee, to be prepared, and signed and acknowledged it. Arriving at Crawford's office, she introduced herself, and delivered the abstracts to him. Crawford said he would have to send them to Chicago for examination, and directed her to return on Friday, July 25. Appellee testified that at Crawford's request she took the deed from a small hand satchel, in which she was carrying it, and handed it to him for examination. After inspecting it, he returned it to her, and she placed it in the satchel. She testified to circumstances affording Crawford an opportunity surreptitiously to take the deed from the satchel. When she left the office she carried the satchel with her, believing, as she testified, that it contained the deed. Subsequently Crawford communicated with her, and directed her to return Tuesday, July 29, to complete the conveyance. She called at Crawford's office on that day, but did not see him. Returning the next day, she talked with Mr. Pixler, who was Crawford's attorney, and occupied an office with him, and informed him in substance that she had come to complete the conveyance. Pixler sent for Mr. Berryhill, Allen's attorney, and the three of them went to the recorder's office, where Mr. Berryhill got the deed which appellee had theretofore signed and acknowledged, and appellee thereupon admitted that she had signed and acknowledged it. The deed had originally been prepared by filling the blanks therein in typewriting. When Berryhill presented it to

her at the recorder's office, it appeared that Crawford's name had been inserted in typewriting as grantee, the printing being similar in color to that used in the preparation of the deed. The deed had also been recorded. Pixler informed appellee that Crawford had sold the lots and absconded. Appellee testified that she did not know that Crawford had the deed until she went to the recorder's office; that she had not delivered it to him at any time, except temporarily, as above stated, and that she had not received any consideration for the conveyance. She testified also that Mr. Pixler and Mr. Berryhill and his law partner, Mr. Remy, and others informed her that her only remedy was to prosecute Crawford, as he had conveyed the premises to innocent parties. These gentlemen, with others, testified that appellee admitted that she had voluntarily left the deed, blank as to grantee, in Crawford's hands. The evidence was sharply conflicting on the question of whether she did leave the deed in Crawford's possession, or whether he obtained the possession of it without her knowledge. On July 28, 1913, Crawford traded the lots to Allen, and received as consideration a large diamond, and a conveyance of other real estate, subject to a mortgage, and a small sum of money. In this transaction Pixler acted as attorney for Crawford, and Remy and Berryhill as attorneys for Allen. Subsequently other conveyances were made as hereinbefore set out. There was evidence tending to show that Allen and his grantees in succession, who are parties to this proceeding, were innocent purchasers of the lots.

Appellants complain of the court's action in permitting appellee, as a witness, to testify to statements made

by Crawford to appellee on the occasion of her

2. visit to his office on July 21, and in the absence of appellants. These statements were in sub-

stance that when she handed him the abstracts he said he would have to send them to Chicago for examination; that he asked her to return to his office at a named time, and that he asked her whether she brought the deeds with her. We might very consistently dispose of the questions raised respecting the hearing of this testimony by holding the admission harmless, if erroneous, but we do not believe there was any error in hearing it. These statements accompanied and explained certain acts and transactions relevant to matters in issue. These acts and transactions were the delivery of the abstracts to Crawford, the postponing of the consummation of the conveyance to a subsequent day, and the fact that Crawford had knowledge of the existence of the deed, and that he had it in his possession. It is not contended that the court improperly heard testimony respecting these acts and transactions. The first and second statements are explanatory of the necessity of appellee's second visit to the office, and were perhaps indicative of a purpose on Crawford's part to obtain title to appellee's property by improper means. The third statement, the inquiry about the deed, is explanatory of appellee's act in delivering it at least temporarily into Crawford's possession. The statements were so closely connected with acts done and transactions had as to be *res gestae*, and therefore properly heard. Jones, Evidence (2d ed.) §358; 10 R. C. L. 794, 983.

Appellants contend that the court erred in the thirteenth instruction, given on its own motion. This instruction is to the effect that the burden was on

3. appellee to prove her claim that the deed was obtained from her surreptitiously, the name of the grantee inserted, and the deed placed of record without her knowledge or consent, "but when she has done so, no other person can gain any rights under it." The in-

instruction does not deal with the question of estoppel. The sole objection urged against it is that by the quoted portion the court assumed that appellee had proven that the deed was obtained from her surreptitiously, etc. Appellants do not correctly interpret the instruction. The meaning assigned to the word "when" determines the question. This word is frequently used in the sense of "provided," "in case of," "and if," or "if." 40 Cyc 920 and notes. In our judgment it is so used here. Appellants use the word "when" in this sense in points 5, 8 and 9 in their brief. The instruction under consideration means in substance "but if she has done so," etc. It does not assume. It is an illustration of those instructions that are correct as far as they go. To be entirely complete in its dealing with the subject-matter, it should contain a proposition in effect that if appellee failed to make the proof indicated, other persons might gain rights under the deed. The alternative proposition was presented by other instructions.

The sixth instruction given at appellee's request is as follows: "One of the contentions of the defendants is that plaintiff on the 31st day of July, 1913, learned that the deed in question had been properly recorded, and that she took no steps to recover the property in question or to give notice of her claim to same until September 6th, 1913, and that as to those taking title subsequent to July 31st, 1913, plaintiff is estopped. But before such knowledge on the part of plaintiff can be held to have estopped her it must appear that plaintiff knew or ought to have known, under the circumstances of this particular case, of her legal rights in the premises in time to have taken the action necessary on her part to have protected said defendants, and the burden of proving such knowledge on the part of plaintiff is upon said defendants."

Appellants contend that by this instruction the court

erroneously placed upon them the burden of proof as indicated. As we have said, appellee, on July 21, 1913, signed and acknowledged the deed, in blank as to the grantee. On or about July 31, she learned that Crawford's name had been inserted as grantee, that he had executed a deed to Allen, and that both deeds had been placed on record. Appellee at no time authorized the insertion of Crawford's name as grantee or the conveyance of the premises to Allen. There is no controversy respecting these facts. There is controversy as to whether appellee voluntarily left the deed in Crawford's possession, or whether he obtained it in some improper manner, and without her knowledge and consent. She testified to the latter state of facts. She was not corroborated. A number of witnesses, including persons apparently disinterested, testified to statements and admissions tending to establish the former state of facts. There was also some substantive evidence to that end.

If Crawford stole the deed, and wrongfully in-

4. serted his name as grantee, such facts, of course, would not constitute a delivery of the deed. If appellee voluntarily left the deed in Crawford's

5. possession, and it was so left for the sole purpose that he might hold it for her until the abstracts

were examined and approved, and that the conveyance to the undisclosed purchaser might be completed by her at a subsequent visit, a delivery of the deed to Crawford as grantee was not contemplated or intended. Under neither supposition then was there a delivery of the deed. A valid delivery of a deed consists of an act and an intent. *Stokes v. Anderson* (1889), 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313. Here, under the one supposition, both the act and the intent were lacking; under the other, a delivery was not intended. A

writing in the form of a deed that passes into the

6. possession of the named grantee, without the

knowledge, consent, or acquiescence of the grantor, and with no intent thereby to deliver it, "is no more effectual to pass title to the grantee than if it were a total forgery, although the instrument may be spread upon the record, and innocent purchasers are not protected." *Henry v. Carson* (1884), 96 Ind. 412; *Fitzgerald v. Goff* (1884), 99 Ind. 28; *Schaefer v. Purviance* (1902), 160 Ind. 63, 66 N. E. 154. It follows that neither Crawford nor his grantees in succession can base a valid title upon the instrument signed and acknowledged by appellee, unless the surrounding facts and circumstances enforce the application of some countervailing equity to that end. The court by the instruction under consideration recognized the existence of such an equity as an abstract principle, and guided the jury in its application to this case. The facts by which such equity is aroused, if at all, are as follows: Appellee, although she had full knowledge on or about July 31 respecting the state of the record in the recorder's office, took no steps prior to September 6 to protect herself or those that might thereby be misled, or at least the record here is silent as to any such steps taken by her. Certain other facts also should be considered in determining the ultimate question of whether the court by the instruction under consideration erred in placing the burden of proof on appellants, as indicated. These facts are as follows: Certain attorneys who represented Crawford and Allen respectively in the transaction by which the former executed the deed to the latter, testified that on July 31 they informed appellee that her sole remedy was a prosecution of Crawford. Other attorneys on that day advised her that they were uncertain as to her remedy. The attorneys of both classes testified that they based their advice on statements made by appellee to them that she voluntarily left the deed in Crawford's possession.

A person may be estopped by his silence, where it is his duty and there is an opportunity for him to speak, or by his passivity where there exists an obligation and an opportunity to act. Such application of the principle of estoppel is sometimes characterized as estoppel by silence or by standing by. In order that such an application of the principle may be effectively invoked, it is essential that the person charged have knowledge of the facts and of his rights. *Anderson v. Hubble* (1884), 93 Ind. 570, 47 Am. Rep. 394; 10 R. C. L. 692; Bigelow, Estoppel (6th ed.) 648.

7. It is a conceded fact that regardless of the means by which Crawford possessed himself of the deed involved here, appellee, on or about July 31, had full knowledge of the state of the record in the recorder's office, and that some innocent person might be deceived to his injury thereby. Such a situation is sufficient to present the question recognized by the court in the instruction under consideration, whether appellee is estopped by her conduct on that occasion and subsequently thereto to deny the validity of the deed as against innocent purchasers. The solution of the question depends on the attending facts and circumstances not clearly revealed by the record before us. It is also a familiar principle in equity that where one of two innocent persons, each guiltless of an intentional moral wrong, must suffer a loss occasioned by the wrongful conduct of another, the loss must be borne by that one of the two persons who by his conduct enabled the involved injury to be inflicted. *Moore v. Moore* (1887), 112 Ind. 149, 13 N. E. 673, 2 Am. St. 170; *Lucas v. Owens* (1888), 113 Ind. 521, 16 N. E. 196. The evidence here, as we have said,

8. tends to establish that appellants were innocent purchasers, and consequently that they were not

9. full knowledge of the state of the record in the recorder's office, and that some innocent person might be deceived to his injury thereby. Such a situation is sufficient to present the question recognized by the court in the instruction under consideration, whether appellee is estopped by her conduct on that occasion and subsequently thereto to deny the validity of the deed as against innocent purchasers. The solution of the question depends on the attending facts and circumstances not clearly revealed by the record before us. It is also a familiar principle in equity that where one of two innocent persons, each guiltless of an intentional moral wrong, must suffer a loss occasioned by the wrongful conduct of another, the loss must be borne by that one of the two persons who by his conduct enabled the involved injury to be inflicted. *Moore v. Moore* (1887), 112 Ind. 149, 13 N. E. 673, 2 Am. St. 170; *Lucas v. Owens* (1888), 113 Ind. 521, 16 N. E. 196. The evidence here, as we have said,

guilty of any wrongful or negligent conduct through which the occasion of loss arose. If the deed was stolen from appellee through no fault of hers and placed of record without her knowledge or consent, it cannot be said that prior to the time when she obtained knowledge of the facts she was guilty of any wrongful or negligent conduct respecting it. If she entrusted the deed to Crawford, it can very consistently be argued that the resultant loss to some one was occasioned by her agency. In either case, she having acquired full knowledge of the facts on or about July 31, the question is presented whether her conduct or inaction thereafter under all the circumstances, including the element of time, amounted to such negligence or such a breach of duty owing to others as that it may be said that she by her conduct enabled the injury to be inflicted, and that as a consequence she was estopped to deny the validity of the deed as against appellants.

It has frequently been held that where a person named as grantee in a deed, in the absence of a legal delivery or of an intent to deliver it, wrongfully

10. obtains possession of it and causes it to be recorded, the grantor, having or obtaining knowledge of the facts, is required to take steps promptly to prevent innocent third persons from acting to their prejudice in reliance on the record, and that by failing to do so, such grantor will be held guilty of such laches or such negligent conduct as will stand as a barrier to his asserting title as against such an innocent purchaser. See the following: *Mays v. Shields* (1903), 117 Ga. 814, 45 S. E. 68; *Pittman v. Sofley* (1872), 64 Ill. 155; *Haven v. Kramer* (1875), 41 Ia. 382; *McConnell v. Rowland* (1900), 48 W. Va. 276, 37 S. E. 586; *Costello v. Meade* (1878), 55 How. Prac. (N. Y.) 356; *Johnson v. Erlandson* (1905), 14 N. D. 518, 105 N. W.

722; *Breeze v. Brooks* (1892), 22 L. R. A. 256, note; *Quick v. Milligan* (1886), 108 Ind. 419, 9 N. E. 392, 58 Am. Rep. 49. In a number of the foregoing some importance is attached to the fact that possession followed the conveyances involved, but we do not regard such element as controlling where, as here, the real estate conveyed is unoccupied and no person is in the actual visible possession of it.

Appellants relied on estoppel to defeat appellee's claim. The burden was therefore on them to establish all the facts necessary to constitute it. 16 Cyc 11. 1; 10 R. C. L. 845. Appellee knew on July 31 that the record title had been in Crawford and that it was then in Allen. She knew also that 12. she had not conveyed the lots. She was inactive for several weeks and in the meantime appellants had parted with their money and property on the faith of the record. These facts were established. In our judgment they were sufficient *prima facie* to constitute estoppel. If there were mitigating circumstances excusing appellee, and from a consideration of which it might not be said that she was guilty of negligence in the premises and that therefore estoppel might not be invoked against her, they were peculiarly within her knowledge. The court by the instruction under consideration placed on appellants the burden of establishing the nonexistence of such mitigating circumstances. It is our judgment that as to such mitigating facts and circumstances, if they existed, it was incumbent on appellee to go forward with the proof, and as a consequence, especially in view of the state of the evidence generally, that the court erred in the instruction. "Delay in the assertion of a right, unless satisfactorily explained, operates in equity as evidence of assent, acquiescence or waiver." *Connell v. Connell* (1889), 32 W. Va. 319, 9 S. E. 252.

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Other questions presented are not decided as they may not arise on a new trial.

The judgment is reversed, with instructions to sustain the motion for a new trial.

NOTE.—Reported in 115 N. E. 96. Estoppel: by acquiescence, 134 Am. St. 1024, 16 Cyc 773; by silence, 16 Cyc 759; by laches, 16 Cyc 761.

LOONEY v. PREST-O-LITE COMPANY.

[No. 9,610. Filed November 14, 1917.]

1. MASTER AND SERVANT.—*Relation of Parties.—Employes of Independent Contractor.*—Where the owner of a building which is being erected by a general contractor engages another contractor to install the heating apparatus and plumbing, and such contractor subcontracts with another to install the plumbing, a workman employed by such subcontractor is the servant of an independent contractor and not of the owner. p. 622.
2. MASTER AND SERVANT.—*Relation of Parties.—Undisputed Questions of Fact.—Province of Court.*—Where the facts relating to the employment of a servant are undisputed, the question as to who is the employer is a proposition of law to be declared by the court. p. 622.
3. NEGLIGENCE.—*Proof.—Res Ipsa Loquitur.—Applicability.*—Although there are instances where the proof of negligence sufficient to make a *prima facie* case under the doctrine of *res ipsa loquitur* may be supplied by a presumption arising from the occurrence of the injury, in such cases it must appear that the instrumentality which inflicted the injury was in control of the defendant, subject to his use and inspection, and that the accident was one which in the ordinary experience of mankind would not have happened except for the negligence of the defendant or of others for whose negligence he is legally responsible, and, if the injury might have resulted from any one of many causes, the complaining party must exclude by a fair preponderance of the evidence the operation of those causes for which the defendant is under no legal obligation. p. 622.
4. MASTER AND SERVANT.—*Injury to Servant of Independent Contractor.—Liability.*—Where an owner of realty engages an independent contractor to erect a building or other structure, and the contract requires the performance of work intrinsically or necessarily dangerous, the owner may be held liable

- to third persons and the contractor's employees injured during the progress of the work. p. 623.
5. **MASTER AND SERVANT.—Injury to Servant of Independent Contractor.—Liability.—Violation of Law.**—An owner of realty, who engages an independent contractor to erect a building or other structure, may be held liable to third persons and the contractor's employees injured in the course of construction, where the work is being done in violation of law or creates a nuisance, or the injury results from some affirmative act or negligence of the owner. p. 623.
6. **MASTER AND SERVANT.—Independent Contractors.—Injury to Servant.—Liability.—Res Ipsa Loquitur.**—Where a landowner engaged an independent contractor to erect, during freezing weather, a reinforced concrete building according to approved plans prepared by a competent architect, and an independent contractor to install the heating apparatus and the plumbing, and the latter subcontracted with another to install the plumbing, an employe of such subcontractor injured in a collapse of the building could not, in an action against the owner, recover on the theory of *res ipsa loquitur* merely because of the fall of the structure, and, in the absence of proof that the erection of a concrete building during freezing weather was necessarily or inherently dangerous, or that the collapse of the building resulted from some affirmative act or negligence of the owner, the defense that the work was being done by an independent contractor was available. p. 624.
7. **APPEAL.—Review.—Harmless Error.**—Where, in an action for personal injuries, there could be no recovery by plaintiff under the undisputed evidence, intervening errors were harmless. p. 627.
8. **APPEAL.—Review.—Harmless Error.—Exclusion of Evidence.**—In an action for personal injuries sustained in a collapse of a building being erected for the owner by an independent contractor, the exclusion of a municipal ordinance requiring permits to be obtained for the erection of buildings, and of evidence that defendant had failed to comply with the ordinance was harmless, where there was no evidence tending to show a causal connection between the violation of the ordinance and plaintiff's injury. p. 628.

From Boone Circuit Court; *Willett H. Parr*, Judge.

Action by William J. Looney against the Prest-O-Lite Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Looney v. Prest-O-Lite Co.—65 Ind. App. 617.

Roy W. Adney and George W. Galvin, for appellant.
John S. Berryhill, Bernard Korbly and Willard New,
for appellee.

FELT, J.—Suit for damages for personal injury brought by appellant against appellee. To the complaint in three paragraphs appellee filed answer in general denial and a special paragraph, in which it alleges in substance that appellant was injured by the collapse of a building which fell while in the process of construction; that the building was being constructed by an independent contractor and appellant when injured was working in said building and was employed by one Louis B. Skinner, a subcontractor, who had contracted with W. H. Johnson and Son Company to do all the plumbing in said building; that W. H. Johnson and Son Company were independent contractors who had entered into a contract with appellee to furnish all material and labor for the plumbing and heating of said building and complete the same according to the plans and specifications therefor by a specified time.

After the issues were formed the venue of said cause was changed to the Boone Circuit Court where the case was tried. At the close of appellant's evidence, on appellee's motion, the court instructed the jury to return a verdict for appellee, which was accordingly done. Appellant's motion for a new trial was overruled, an exception reserved, and judgment was rendered on the verdict, from which this appeal was taken.

The error assigned and relied on for reversal is that the court erred in overruling appellant's motion for a new trial. A new trial was asked on the ground that the verdict of the jury is not sustained by sufficient evidence; that the court erred in instructing the jury to return a verdict for the defendant, and in sustaining

appellee's objection to the introduction of certain evidence offered by appellant.

The building mentioned in this suit, and many of the essential facts, are identical with those considered in the case of *Prest-O-Lite Co. v. Skeel* (1914), 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A 474.

Appellant alleges that the plans for the building were prepared by an architect, for the construction of a reinforced concrete building of a certain kind, and that the contract was let for a building of a different type of construction from that provided by the plans and specifications; that the contract was for a two-story building, and after the building was partly constructed a third story was added; that on December 6, 1911, while the roof of the building was being placed thereon, the building collapsed and fell; that appellant at the time was in the lower part of the building working as a plumber and was caught and severely injured.

Appellant also charges that appellee entered upon the construction of said building in the month of November, 1911; that the construction of such a building at that season of the year was and is inherently dangerous; that at that time the construction of such buildings was only in the experimental stages; that appellee knew, or by the exercise of ordinary care could have known, of the extra perils and inherent dangers incident to the construction of a concrete building at that season of the year.

The substance of the evidence material to the questions presented is as follows: Appellee employed a competent architect who prepared complete plans and specifications for the erection of a reinforced concrete building. The general contract was let to Wolf and Ewing, competent and experienced building contractors. The contract for the plumbing and heating was let by appellee to W. H. Johnson and Son Company, and the

latter sublet the plumbing to Louis D. Skinner, a competent and experienced plumber, who employed appellant to work as a plumber and who was so working for him in the aforesaid building when it fell and injured appellant on December 6, 1911. Vernon H. Church of the local office of the Indianapolis weather bureau testified to the maximum and minimum temperature in said city from October 20 to December 6, 1911, and stated that the barometer at said station did not indicate any seismic disturbance on December 6, 1911. Witnesses testified to the effect of freezing weather on concrete; that Wolf and Ewing had previously successfully constructed reinforced concrete buildings; that many concrete buildings are constructed in the winter and there are many ways known to the building trade for protecting concrete and preventing damage in cold weather; that a number of reinforced concrete buildings had been successfully erected in Indianapolis prior to December, 1911, some of which were similar in plan to the one which collapsed and injured appellant. The contract between appellee and W. H. Johnson and Son Company was introduced in evidence, and shows that such company was to furnish all material and labor and complete the heating plant and the plumbing for said building in accordance with the plans and specifications by a certain date for a specified sum of money. The evidence also shows the collapse and fall of the building and appellant's injury.

Appellant contends that, under the issues and the evidence, he (appellant) was employed by appellee "through Johnson and Son Company" to do plumbing in said building, and therefore appellee owed him the duty of furnishing him a safe place to work; that the work of constructing the building was undertaken at a time and in a manner that made it inherently dangerous, all of which was known to appellee, or could have

been known by the exercise of ordinary care; that the rule of *res ipsa loquitur* is applicable, may be invoked by appellant, and requires appellee to explain the cause of the fall of the building and to show that it was not due to its negligence, in order to avoid liability.

The undisputed evidence shows that appellant was employed by Mr. Skinner, the subcontractor, under W.

H. Johnson and Son Company, who had con-

1. tracted with appellee to do the plumbing and heating provided by the plans for the building.

Therefore appellant was in no sense an employe of appellee, but must be held to be the servant of the independent contractor. The arrangement between Skinner and Johnson and Son Company did not change the relation of appellant to appellee. Johnson and Son

Company, on the facts of this case, cannot be

2. held to hold any relation to appellee other than that of independent contractor. The facts are undisputed and the proposition therefore resolves itself into one of law to be declared by the court. *Prest-O-Lite Co. v. Skeel, supra.*

Appellant being an employe of an independent contractor, this appeal is controlled by the decision of the Supreme Court in *Prest-O-Lite Co. v. Skeel, supra*, unless there is something in this case which distinguishes it from the former.

The facts of this case do not warrant the application of the rule of *res ipsa loquitur*. This question was considered by the Supreme Court in the Skeel case,

3. *supra*, and the language employed is applicable to the case at bar, viz.: "Undoubtedly there are instances where the proof of negligence sufficient to make out a *prima facie* case may be supplied by a presumption that arises from the occurrence of the injury. But in such cases it must appear that the instrumentality which inflicted the injury was in the control of the defendant,

subject to his use and inspection, and also that the accident was one which in the ordinary experience of mankind would not have happened unless from the negligence of the defendant, or that of others for whose negligence he is legally responsible. Where the injury might well have resulted from any one of many causes, the plaintiff, by a fair preponderance of the evidence, must exclude the operation of those causes for which the defendant is under no legal obligation. The thing which causes the injury must be shown to have been under the management of the defendant before the doctrine of *res ipsa loquitur* applies. Indeed, the theory of the law in respect to this doctrine proceeds from the fact that the management or control of that which occasioned the injury is exclusively within the power of the defendant as between him and the plaintiff, and that it works no injustice by requiring him to explain."

Appellant further asserts that the facts of this case bring it under an exception to the general rule applicable to employes of independent contractors who

4. seek to recover damages for personal injuries from the owners of real estate for whom such contractors have undertaken to erect buildings or other structures. Such owners may be held liable to a third person or an employe of such independent contractor in several instances, among which are cases where the contract requires the performance of work intrinsically or necessarily dangerous, however skilfully performed.

Likewise in cases where the work to be done is

5. in violation of law or creates a nuisance, or where the injury results from some affirmative act or negligence of such owner. *Murphy v. Altman* (1898), 28 App. Div. 472, 51 N. Y. Supp. 106, 108; *Burke v. Ireland* (1898), 26 App. Div. 487, 50 N. Y. Supp. 869, 372; *Engel v. Eureka Club* (1893), 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. 692; *Laffery v. Gyp-*

sum Co. (1910), 83 Kan. 349, 354, 111 Pac. 498, 45 L. R. A. (N. S.) 930, Ann. Cas. 1912A 590; *Gallagher v. Southwestern, etc., Assn.* (1876), 28 La. Ann. 943; *Thomas v. Harrington* (1903), 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742, and notes; *Louisville, etc., R. Co. v. Tow* (1901), 23 Ky. Law 408, 63 S. W. 27, 66 L. R. A. 941; *Jacobs v. Fuller, etc., Co.* (1902), 67 Ohio St. 70, 65 N. E. 617, 65 L. R. A. 833; *Missouri, etc., Iron Co. v. Ballard* (1909), 53 Tex. Civ. App. 110, 116 S. W. 93, 98; *Earl v. Reid* (1910), 18 Ann. Cas. 1, 9; *Stubley v. Allison Realty Co.* (1908), 124 App. Div. 162, 108 N. Y. Supp. 759, 763; 2 Dillon, Mun. Corp. (4th ed.) §1029; 1 Thompson, Com. Law of Neg. (2d ed.) §§621, 627, 652; 26 Cyc 1084; 16 Am. and Eng. Ency. Law 192.

There is nothing in the evidence tending to show that the work which appellee contracted to have done in the erection of the building or in the plumbing or

6. heating, was inherently or necessarily dangerous, however skilfully done, or that appellee was in any way responsible for the collapse and fall of the building. There is no proof that the plans were defective and that the building collapsed because of such defects; no proof that appellee retained any control over the building or the several independent contractors other than compliance with their several contracts as to the results to be obtained, or that it interfered with the work or assumed any authority or did any affirmative act which could in any way have operated as a contributing or proximate cause of the collapse and fall of the building.

Appellant apparently relies upon the following facts: The building was constructed of reinforced concrete; the contract required the work to be done in the fall and early winter when the concrete was liable to be frozen and there was freezing weather before Decem-

ber 6, 1911. The original contract was for a two-story building, which was changed to three stories and the building was so erected; the building collapsed and fell on December 6, 1911, while the roof was being placed thereon, and there is no definite proof of the cause of the collapse.

The evidence shows without dispute that the plans were prepared originally for a three-story building and that though the original contract called for the erection of a two-story building, the change made while the building was in the process of construction was made in conformity with the plans and specifications; that the several contracts, including the contract for the heating and plumbing, were changed or supplemented to cover the work required by the addition of the third story prior to the time the building collapsed and fell; that the plumbing and heating contracts contemplated and required work of the kind appellant was doing when injured to be done while the building was being constructed by the general contractors. The evidence tends to show that freezing may or may not be injurious to concrete construction, depending on the way the work is managed and the way the concrete is protected and cared for after it becomes a part of the structure. The undisputed evidence also shows that prior to the erection of the building in question concrete buildings had been erected in Indianapolis, in the winter time; that good results had been secured and the buildings were safe and substantial structures.

Reduced to its last analysis the contention of appellant is that to contract for the erection of a reinforced concrete building to be constructed by competent and experienced builders of such structures, according to approved plans and specifications prepared by a skilled and competent architect, with no control of the build-

ing or work reserved to the owner, the work to be done at a season of the year when freezing weather may be expected, makes the work so inherently and necessarily dangerous, as to take the transaction out of the operation of the general rule applicable to injuries received by workmen employed by independent contractors, and brings it under the exception whereby the owner of such building may be held liable to such employe for an injury received on account of the fall of such building, notwithstanding the work was let to independent contractors and was done in pursuance of such contracts.

Giving appellant the benefit of the evidence most favorable to him and all the inferences that may reasonably be drawn therefrom, on the facts of the case as presented, this court is not warranted in holding that the case comes within the exception to the general rule aforesaid, and therefore holds that the undisputed evidence shows that appellee is not liable to appellant for the reason that appellant was at the time of his injury employed by an independent contractor and engaged in performing services for such contractor in the due execution of his contract with appellee.

The evidence shows that appellee in undertaking to erect such building at the season of the year the work was undertaken was following the custom or usage established by competent and experienced builders of such structures. Therefore no inference of inherent or necessary hazards incident to such work can be drawn against it, unless the work of erecting such structures generally is so inherently and necessarily dangerous as to invoke the exception to the general rule aforesaid, and we find no authority anywhere that would sanction such a holding. In 1 Thompson, Com. on the Law of Negligence §652, the learned author in speaking of the exception to the general rule aforesaid, says: "It is but another expression of the principle to say that if, ac-

cording to previous knowledge and experience, the work which the proprietor engages the contractor to do is *inherently dangerous* to third persons, and *likely to lead to mischief*, however carefully performed, it will be incumbent upon him to foresee such mischief, and to take precautions against it." In §650, the same author says: "It is merely another way of stating the preceding proposition to say that the proprietor is liable, on the principle of being answerable for his own negligence, where the injury proceeds from the nature of the work itself, and not from the manner in which the independent contractor has executed it. If, for any reason, the nature of the work is such that when done in the ordinary mode, it is necessarily or naturally injurious, in a legal sense, to a third person, the proprietor must answer to him in damages for it."

As already pointed out, the rule of *res ipsa loquitur* does not apply to this case. Johnson and Son Company was an independent contractor. Skinner, for whom appellant was working, was a subcontractor under Johnson and Son Company. There is no evidence tending to show that the work covered by the contracts was inherently or necessarily more dangerous than the work of constructing such buildings generally. Appellee retained no control over the building or work, and was only interested in the ultimate results required by the several contracts. It committed no affirmative act of negligence. The evidence not only fails to show that appellee was in any way responsible for the collapse and fall of the building, but it fails to show what caused the building to fall and leaves the matter to speculation and conjecture. In this situation there can be

7. no recovery by appellant against appellee, and intervening errors, if any, are not available to reverse the judgment. Since the undisputed evidence shows there can be no recovery, the trial court did not

err in directing the verdict. *State, ex rel. v. State Board, etc.* (1909), 173 Ind. 706, 710, 91 N. E. 338; *Marion Shoe Co. v. Eppley* (1913), 181 Ind. 219, 222, 104 N. E. 65, Ann. Cas. 1916D 220; *Casement v. Brown* (1892), 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; *Hart v. Washington Park Club* (1895), 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. 298; *Bjornson v. Saccone* (1899), 88 Ill. App. 6, 11; *Callan v. Pugh* (1900), 54 App. Div. 545, 66 N. Y. Supp. 1118; *Laffery v. Gypsum Co., supra*; *Jacobs v. Fuller, etc., Co., supra*; *Symons v. Road Directors* (1907), 105 Md. 254, 65 Atl. 1067; *Petrie v. Small Realty Co.* (1910), 141 App. Div. 681, 125 N. Y. Supp. 937; *Weilbacher v. Putts Co.* (1914), 123 Md. 249, 91 Atl. 343, Ann. Cas. 1916C 115; *Trim v. Fore River Ship Bldg. Co.* (1912), 211 Mass. 593, 98 N. E. 591; *Fink v. Slade* (1901), 66 App. Div. 105, 72 N. Y. Supp. 821; *Griffen v. Manice* (1901), 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. 630.

Appellant also asserts that the trial court excluded from the evidence a municipal ordinance requiring permits to be taken out for the erection of buildings

8. in the city of Indianapolis. It is also claimed that no permit was taken out for the erection of the third story of the building, and that the violation of such ordinance was negligence *per se*, and the ruling of the court excluding the ordinance was harmful to appellant.

Conceding the validity of the ordinance and that the court erred in excluding it, the ruling does not constitute reversible error, for, on the facts of the case as presented, there is no evidence tending to show a causal connection between the alleged violation of the ordinance and appellant's injury. Without evidence tending to show such causal connection, proof of such ordinance and its violation would avail nothing in appellant's behalf, and the ruling, if erroneous, would not be

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harmful to appellant or constitute reversible error. *Prest-O-Lite Co. v. Skeel, supra; Switow v. McDougal* (1915), 184 Ind. 259, 261, 111 N. E. 3.

Judgment affirmed.

NOTE.—Reported in 117 N. E. 678. See under (1, 5) 26 Cyc 1567, 54 Am. St. 91, 76 Am. St. 384.

JOHNSON v. FIRST NATIONAL BANK OF WHITING.

[No. 9,394. Filed November 14, 1917.]

1. DISMISSAL AND NONSUIT.—*Dismissal of Action.—Reinstatement.—Proceedings.—Pleading.—Notice to Defendant.—Statute.*—Under §405 Burns 1914, §396 R. S. 1881, providing that the court shall relieve a party from any judgment taken against him through his mistake, inadvertance, surprise, or excusable neglect, on complaint or motion filed within two years, the application to be relieved from a judgment, if made at a subsequent term, is in the nature of a new proceeding, and the party in default must proceed by a pleading in the nature of a complaint, and, in the absence of an appearance by the opposing party, notice is required; hence, where an action was dismissed for want of prosecution, it was error for the trial court at a subsequent term to restore the cause to the docket on the verbal application of plaintiff, without notice to, or appearance by, the defendant. p. 632.
2. APPEAL.—*Reserving Questions for Review.—Exceptions.—When Taken.—Statute.—Scope and Application.*—Section 656 Burns 1914, §626 R. S. 1881, providing that a party objecting to any decision of the court must except at the time the decision is made, did not require defendant to except at the time to an order restoring to the docket an action dismissed at a previous term for want of prosecution, where the order was made on the verbal motion of plaintiff, without notice to or appearance by defendant, since the court did not have jurisdiction over his person, so that the ruling on the motion to redocket was not binding on him. p. 633.
3. APPEAL.—*Review.—Waiver of Error.—Necessity of Timely Exception.*—Where defendant, knowing that the case had been dismissed and restored to the docket at a subsequent term without notice to or appearance by him, and that a default judgment was rendered in plaintiff's favor, moved to set aside the default and proceeded to defend without complaining of any

irregularities in the prior proceedings, he waived any error in the trial court's action on plaintiff's motion to redocket the cause, and the ruling on such motion could not be challenged by defendant for the first time by an assignment of error on appeal. p. 634.

From Lake Superior Court; *Charles E. Greenwald*, Judge.

Action by First National Bank of Whiting against August H. W. Johnson and another. From a judgment for plaintiff, the defendant named appeals. *Affirmed.*

Meade & Royce, for appellant.

F. N. Gavit John C. Hall and Walter H. Smith, for appellee.

CALDWELL, J.—Appellee brought this action against appellant and Carl Johnson to recover on an assignment of account executed by the latter to appellee, and directed to, and accepted by, appellant. Process was not served on Carl Johnson. Appellant filed an answer in two paragraphs. On December 19, 1913, the action was dismissed by the court for want of prosecution. On February 2, 1914, at a subsequent term, an entry was made restoring the cause to the docket, the entry being as follows: "Upon motion of the plaintiff this action is now restored to the docket." The sole error assigned and relied on is predicated on the action of the court in restoring the cause to the docket.

It will be observed that the entry does not disclose that appellant reserved an exception to the ruling complained of, or whether the appellant was in court or had knowledge of such ruling at the time. Nor does it affirmatively appear that appellee filed with the court a complaint or motion in writing that formed the basis of the ruling complained of, or that notice of any such motion was served on appellant, or that appellee made a showing of mistake, inadvertance, surprise, or excusable neglect, and thus appealed to the court to be re-

lieved from the consequences of the dismissal of the action.

The following further facts should be considered: On May 13, 1914, the cause was submitted to the court for trial; appellant failed to appear and was defaulted, and judgment rendered against him. On September 21, 1914, appellant filed a motion in writing to set aside such default, and that he be permitted to defend, which motion was sustained, and the default set aside February 1, 1915. Subsequently appellee demurred to the second paragraph of appellant's answer theretofore filed, whereupon appellant withdrew such paragraph. A trial was thereupon had, the evidence heard, and judgment rendered in favor of appellee and against appellant. Appellant subsequently filed a motion for a new trial, which was overruled.

In considering the questions presented, we shall assume that appellant was not in court, and that he did not have knowledge, at the time, of the action of the court in restoring the cause to the docket. We shall assume also that the court's action was predicated on the mere verbal motion of appellee, and that notice of such motion was not served on appellant. It appears also from the record that appellant subsequently was informed from some source respecting the actual state of the record, and that judgment had been entered against him on default. Thereafter he appeared, procured the default to be set aside and the judgment to be vacated, participated in completing the issues and in the trial, and thereafter filed his motion for a new trial. In none of such subsequent proceedings did he complain of the court's order restoring the cause to the docket, or take any steps to procure the vacating of such order, or make any objection or reserve any exception to the action of the court in that respect. In the place of bringing to the attention of the court any

grievance that he felt had been inflicted on him, he conducted himself in such a manner as apparently to indicate that the prior proceedings were satisfactory to him. Under such circumstances may appellant predicate available error on the action of the court in restoring said cause to the docket?

There is a statute to the effect that the court shall relieve a party from a judgment taken against him through his mistake, inadvertance, surprise or

1. excusable neglect, on complaint or motion filed within two years. §405 Burns 1914, §396 R. S. 1881. In *West v. Noakes* (1842), 6 Blackf. 335, 38 Am. Dec. 146, decided before there was any specific statute on the subject, it was held error to restore an action which had been dismissed at a previous term, no cause being shown for restoring it. *Brumbaugh v. Stockman* (1882), 83 Ind. 583, was decided under §99 of the act of 1852 (2 R. S. 1852 p. 48). That section on the subject of setting aside defaults was practically identical with §405, *supra*, as above outlined, except that the former contained no provision specifying that the party in default should proceed by complaint or motion. However, in the case last cited the court said: "Under section 99 of the code, defaults are set aside either on complaint or motion; a motion is the proper proceeding during the term at which the default was taken; after the term a complaint or petition, verified or supported by affidavit, is the proper proceeding. The motion is a proceeding in the suit, and, unless required by a rule of the court, it needs no notice, because the court has control of its proceedings and jurisdiction of the parties unto the end of the term. *Burnside v. Ennis*, 43 Ind. 411. After the term the complaint is a new proceeding, and requires notice. *Lake v. Jones*, 49 Ind. 297." The present statute contemplates a com-

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plaint or motion in writing. *Indianapolis, etc., R. Co. v. Crockett* (1891), 2 Ind. App. 136, 28 N. E. 222.

If the application to be relieved from a judgment taken on default is made at a subsequent term, such application is in the nature of a new proceeding. The party in default should therefore proceed by a pleading in the nature of a complaint and, in the absence of an appearance, notice is required. *Albany Land Co. v. McElwaine, etc., Co.* (1894), 11 Ind. App. 477, 39 N. E. 297.

Here at a subsequent term the machinery of the court was set in motion by a mere verbal application on which no notice was issued, and to which appellant did not appear. We conclude that the action of the court in restoring said cause under the circumstances was at least erroneous.

Appellant, however, reserved no exception to the action of the court in restoring the cause. It is provided

by statute that the party objecting to any decision of the court must except at the time the decision is made. §656 Burns 1914, §626 R. S. 1881. In order that a person may be required to object and except to a decision purporting to affect his rights, it is essential that the court in rendering its decision have jurisdiction over his person. Where the requirement exists, "The obligation to object and except to a decision of the court implies that the party required to object and except shall be afforded an opportunity to do so. It cannot, with any show of fairness and reason, be claimed that a party assents to a ruling of a court of which he has no knowledge or opportunity of acquiring knowledge. We are of the opinion that when an objection and exception is taken at the first legal opportunity, it is in time." *Wabash R. Co. v. Dykeman* (1892), 133 Ind. 56, 32 N. E. 823; *Lewis v. Nielson* (1911), 176 Ind. 414, 96 N. E. 145.

The ruling, however, was made in a new proceeding of which appellant had no notice. The court, therefore, did not have jurisdiction over his person, and the ruling was not binding on him. *McKinney v. Frankfort, etc., R. Co.* (1895), 140 Ind. 95, 38 N. E. 170, 39 N. E. 500; *Davis v. Bayless* (1895), 140 Ind. 700, 38 N. E. 400; 15 R. C. L. 844.

Appellant, when he subsequently received information that the case had been restored, had before him at least two courses, either of which he was at lib-

erty to pursue: First, he might have brought to the attention of the court the irregularities attending the redocketing of the action, and on the facts moved that the order be vacated. Had he met with an adverse ruling, a reserved exception would have placed the record in condition so that the decision of the court might have been reviewed by this court. Second, In recognition that, if he procured such order to be vacated, there was nothing to prevent appellee from re-filing its complaint, and thus forcing a trial on the merits, appellant was at liberty to ignore the irregularities accompanying the restoring of the cause, and, confining his preliminaries to a motion to set aside the default against him, proceed to defend on such default being set aside. He elected to pursue the latter course, and by an assignment of error in this court he first complains of the trial court's action in restoring the cause. Under the circumstances, it is our judgment that he waived whatever error, irregularity, or invalidity there was in the ruling complained of.

A waiver is "an intentional relinquishment of a known right; * * * a neglect or omission to insist upon a matter of which a party may take advantage at the time when it should be done, so that it may operate as a trap to the other party, to insist upon it afterwards." 40 Cyc 252 *et seq.*

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The record in the trial court plainly disclosed that the cause had been dismissed and subsequently reinstated, and there is no contention that appellant did not have actual knowledge of the facts when he appeared in court and successfully moved to set aside the default that had been entered against him, and proceeded to defend. He neglected, however, to take any steps to relieve himself from the situation. It is said that every failure to assert a right at the proper time is a waiver of that right. *Zehnor v. Beard* (1856), 8 Ind. 96.

The following language, peculiarly applicable here, is used by the court in *Preston v. Sandford's Admr.* (1863), 21 Ind. 156: "It would be impolitic to allow a party to consent to go to trial upon a given state of the record, take his chance of success upon it, and, failing, to then turn round, repudiate his own voluntary act, and thus defeat his opponent under all circumstances." See also *Coleman v. State* (1887), 111 Ind. 563, 567, 13 N. E. 100, and the following applicable by analogy: *American, etc., Tin Plate Co. v. Reason* (1915), 184 Ind. 125, 129, 110 N. E. 660; *Haun v. Wilson* (1867), 28 Ind. 296, 303; *Miles v. Buchanan* (1871), 36 Ind. 490, 499; *Egoff v. Board, etc.* (1907), 170 Ind. 238, 245, 84 N. E. 151; *Indianapolis, etc., Traction Co. v. Brennan* (1909), 174 Ind. 1, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85; *Messenger v. State* (1898), 152 Ind. 227, 231, 52 N. E. 147; *Cleveland, etc., R. Co. v. Starks* (1914), 58 Ind. App. 341, 348, 106 N. E. 646.

Judgment affirmed.

NOTE.—Reported in 117 N. E. 676.

IN RE LANMAN ET AL.

[No. 10,027. Filed November 15, 1917.]

1. **MASTER AND SERVANT.—***Workmen's Compensation Act.—Right to Compensation.—Sisters and Nieces.—Proof of Dependency.*—As §38 of the Workmen's Compensation Act, Acts 1915 p. 392, does not include sisters and nieces in any of the classes in which dependency is conclusively presumed, the dependency of a sister and a niece must be determined in accordance with the fact at the time of the death of the employe. p. 640.
2. **MASTER AND SERVANT.—***Workmen's Compensation Act.—Right of Sister to Compensation.—Dependency.*—Where a sister of a deceased employe lived in his home for a number of years preceding his death with the understanding that deceased was to furnish the home and provide for her, and that she was to act as his housekeeper, and during such period deceased gave to the sister, who had no independent means of her own, all his earnings, with which the expenses of the home, including her entire support, were paid, the agreement does not show such a contractual relation as to deprive her of compensation as a dependent under the Workmen's Compensation Act, Acts 1915 p. 392, but rather the support was furnished in recognition of a moral obligation, and she was entitled to compensation as a total dependent, even though she may have been able to work for others and support herself. p. 640.
3. **MASTER AND SERVANT.—***Workmen's Compensation Act.—Right to Compensation.—Niece.*—Where a deceased employe's niece, who was a minor and whose home was with her parents, stayed with deceased the greater portion of each week for several years when school was in session as a matter of convenience, the mere fact that during such time deceased gratuitously furnished her board, some of her clothes and some of her school supplies did not make her a dependent on him within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392. p. 643.

From the Industrial Board of Indiana.

Certified Questions of Law.

Proceedings under the Workmen's Compensation Act in the matter of one Lanman and others. Questions of law certified by the Industrial Board. *Questions answered.*

BATMAN, J.—Under the provisions of §61 of the Workmen's Compensation Act, Acts 1915 p. 392, as amended by the act of 1917, Acts 1917 p. 154, the Industrial Board has certified to this court certain questions of law, based upon the facts presented by a proceeding pending before that body, seeking the opinion of this court for guidance in determining such proceedings.

The statement of facts as submitted by the board is as follows: "On the 13th day of December, 1916, one William Lanman was in the employment of the Indianapolis Light and Heat Co., as a lineman at an average weekly wage of \$17.53; that on said date the said William Lanman received a personal injury by an accident arising out of and in the course of his employment, resulting in his death on said date; that said employer had actual knowledge of the injury of the said William Lanman at the time that it occurred and executed a report thereof to the Industrial Board on said date and filed the same with said board on the 16th day of December, 1916; that the said William Lanman was unmarried at the time of his death; that he left no child or children surviving him and no descendants of any child or children; that the said William Lanman for approximately fifteen years prior to his death had been a resident of the city of Indianapolis, Indiana; that he owned a residence property in which he, his mother, Luella Grace Lanman, a sister, and a sister, Alice Lanman, lived together until about six years before his death; that during said time the said William Lanman provided the home, furnished it, and provided the food and clothing for his said mother and two sisters; that his mother died some six years prior to the death of William Lanman; that for several years prior to her death his mother was blind; that the sister Alice Lanman was in very poor health and died approximately

five years prior to the death of the said William Lanman; that during the time that the four lived together, and during the time that the three lived together, Luella Grace Lanman was the housekeeper and nursed her mother and invalid sister; that as a result of her confinement and arduous duties in nursing her mother and invalid sister, the health of Luella Grace Lanman failed, and for the last past five years she has been in an impaired condition of health; that upon the death of the mother of Luella Grace Lanman, Sarah Estella Lambert, a niece of William Lanman and of Luella Grace Lanman, took up her home with said William Lanman and the said Luella Grace Lanman and lived with them during the school term until the death of William Lanman; that during the time that she lived with Luella Grace Lanman and William Lanman, the said Sarah Estella Lambert was supported by the said William Lanman, who during said time provided her with a home, with food, some clothing and some of her school supplies; that during school terms it was the custom of Sarah Estella Lambert to return to the home of her mother and stepfather on Friday evenings and return again to the home of William Lanman on Monday mornings and remain at said home, except during her attendance at school, on Mondays, Tuesdays, Wednesdays, Thursdays and Fridays of each week, and during the vacation between school terms she lived at the home of her stepfather and her mother; that the said Sarah Estella Lambert was not at any time emancipated by her parents; that her living with her uncle and aunt was a matter of convenience to the said Sarah Estella Lambert in attending school and the provision made for her by William Lanman was purely gratuitous; that upon the death of the mother the said William Lanman advised Luella Grace Lanman not to worry over her condition; that he would furnish her a home and pro-

vide for her so long as he was able; that at said time the said William Lanman and the said Luella Grace Lanman entered into an understanding or arrangement whereby the said William Lanman was to furnish the home and provide for his said sister and in return therefor she was to act as housekeeper, and in consummation of said agreement or understanding the said William Lanman from said time until his death, did furnish the home and turned over to his said sister his entire earnings, out of which the expenses of maintaining the home, including food and clothing for both himself and sister and other necessary and incidental expenses were paid; that during said time except for a period of about three weeks, as hereinafter stated, the said Luella Grace Lanman acted as housekeeper and did all the housework including cooking, washing, etc.; that the said Luella Grace Lanman is a stenographer by profession and some three years before the death of William Lanman, by mutual arrangement between herself and her said brother, took up work in her profession, at which she continued for about three weeks, and upon finding that her health would not permit her to continue said work, she and her brother resumed their former method of living together and so continued until the death of William Lanman; that the said Sarah Estella Lambert was sixteen years of age on April 24, 1917; that at the time of the death of William Lanman she was neither physically nor mentally incapacitated from earnings."

Upon the foregoing facts the Industrial Board submits the following questions: (1) Was Luella Grace Lanman a dependent of William Lanman at the time of his death within the meaning of the Indiana Workmen's Compensation Act? (2) If a dependent, was she a total or a partial dependent? (3) Was Sarah Estella Lambert a dependent of William Lanman at the time

of his death within the meaning of the Indiana Workmen's Compensation Act? (4) If a dependent, was she a total or a partial dependent?

The questions submitted for our determination involve the dependency of a sister and niece on the earnings of an employe. The Workmen's Compensation

1. Act, *supra*, of this state makes certain provisions for dependents, but does not undertake to define dependency. Section 38 of such act specifies who shall be conclusively presumed to be wholly dependent for support upon a deceased employe, and then provides as follows: "In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury." It will be found that sisters and nieces are not included in any of the classes in which dependency is conclusively presumed by the terms of the act. The fact of their dependency and the degree thereof must therefore be determined in accordance with the existing facts at the time of the death of the employe in question.

In considering the questions submitted, there are certain facts not clearly appearing which we shall assume,

viz.: That the said Luella Grace Lanman was
2. relying on the said William Lanman, at the time of his death, for her present and future support, and that she had reasonable grounds for so relying. With these assumptions, we are clearly of the opinion that the facts stated show that the said Luella Grace Lanman was a total dependent of the deceased William Lanman, at the time of his death, within the meaning of the Indiana Workmen's Compensation Act. It cannot be said, under the facts stated, that Luella Grace Lanman was working for her brother at the time of his death, under a contract of employment, and for that reason she is not entitled to compensation as a depend-

ent. The statement of facts shows that at the time of the death of their mother the said William Lanman told his sister, Luella Grace, not to worry over her condition, and promised to furnish her a home as long as he was able; and that thereafter until his death he did furnish the home in which they lived, and turned over to his said sister his entire earnings, out of which the expenses of maintaining the home were paid, including her entire support. It is apparent that the deceased supported his sister as stated, not as a gratuity, but in recognition of a moral, if not a legal obligation to support her in accordance with the promise made when he induced her to remain in the home as housekeeper, and thereby become a nonproducer. And if she relied on such obligation and promise, such facts are sufficient to create a relationship of dependency, as a basis for compensation. *Kenney's Case* (1916), 222 Mass. 401, 111 N. E. 47.

The fact that the sister remained in the home of her brother, after the death of their mother, as a housekeeper, under an arrangement or understanding that the deceased was to furnish the home and provide for his sister, and in return therefor she was to act as his housekeeper, does not show such a contractual relation as to deprive her of compensation as a dependent. Such fact does not show a contractual rather than a family relation. It is quite natural in all family relations, not imposed by law, that there be an understanding or an arrangement as to the division of labor, contribution of funds and performance of duties, in the support of the family and maintenance of the home. The facts stated show no more than this in the relation between the brother and sister in question.

It appears that the said Luella Grace Lanman received her entire support from the earnings of her de-

ceased brother, and that she had no independent means of her own. Therefore, if she was a dependent of her deceased brother in any degree, she was a total dependent. This would be true, although she may have been able to work for others, and thereby earn wages with which to support herself. A fair and reasonable construction of the Indiana Workmen's Compensation Act, *supra*, does not require that a person, in order to be adjudged a dependent, must be incapable of supporting himself or herself by reason of physical or mental affliction. This construction finds support in the decisions of the court in a sister state, involving a workmen's compensation act with a provision with reference to dependents not conclusively presumed, identical with the Indiana Workmen's Compensation Act, *supra*. *Herrick's Case* (1914), 217 Mass. 111, 104 N. E. 432, L. R. A. 1916A 249; *Kenney's Case*, *supra*. But if a different construction should be given the act under consideration, the facts stated would justify a conclusion that the sister was physically unable to support herself from her earnings. This is made manifest from the statement that "as a result of her confinement and arduous duties in nursing her mother and invalid sister, the health of Luella Grace Lanman failed, and for the past five years she had been in an impaired condition of health," and from the further statement that about three years prior to decedent's death she undertook to resume her work as a stenographer, but was compelled to give it up after three weeks, as her health would not permit her to continue it. True, she may have had sufficient health to act as housekeeper for her brother, but it by no means follows that she was physically able to go from her home and earn sufficient wages at similar or other work for her support.

A careful consideration of the facts stated leads us to the conclusion that Sarah Estella Lambert was not

a dependent of William Lanman, at the time of
3. his death, within the meaning of the Indiana Workmen's Compensation Act. It appears that she was sixteen years old and not emancipated; that her home was with her mother and stepfather, but she stayed with her uncle and aunt five days of each week for several years when school was in session as a matter of convenience. The mere fact that her uncle did not charge her for board and gratuitously furnished her some clothing and school supplies does not make her a dependent on him within the meaning of the act in question.

We therefore conclude from the statement of facts submitted, when considered in connection with those assumed, as stated, that the said Luella Grace Lanman was a total dependent of William Lanman, at the time of his death, within the meaning of the Indiana Workmen's Compensation Act, *supra*. We further conclude that the said Sarah Estella Lambert was not a dependent of William Lanman at the time of his death, within the meaning of said act.

NOTE.—Reported in 117 N. E. 671. Workmen's compensation: who are dependents within meaning of acts, L. R. A. 1916A 248, L. R. A. 1917D 157.

ZEITLOW v. SMOCK.

[No. 10,006. Filed November 15, 1917.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act*.—*Appeal*.—*Presenting Questions for Review*.—*Assignment of Error*.—Under §61 of the Workmen's Compensation Act, Acts 1915 p. 392, as amended by the act of 1917, Acts 1917 p. 154, the assignment of error that the award of the full board is contrary to law is authorized and is sufficient to present for review on appeal both the sufficiency of the facts found to sustain the award, and the sufficiency of the evidence to sustain the finding of facts. pp. 646, 648.

2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Powers of Industrial Board.—Rules of Procedure.*—Section 55 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that the procedure thereunder shall be as summary and simple as reasonably may be, and that, for the purpose of carrying out the provisions of the act, the Industrial Board may make rules not inconsistent with it, empowered the board to promulgate a rule that no answer is required and, if none is filed, the allegations contained in the application, petition or complaint will be deemed to be denied. p. 647.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Presumptions.*—On an appeal from an award by the Industrial Board, the Appellate Court will indulge every reasonable presumption in favor of sustaining the award, but in the absence of anything in the record showing such fact, the presumption cannot be indulged, in favor of the board's action, that a rule that if no answer is filed the allegations of the petition would be deemed to be denied was made and published by the board and in force at the time of the hearing of the case appealed. p. 647.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Reserving Grounds for Review.—Failure to File Answer.—Necessity of Objection.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, where both parties appeared before the board and the cause was heard and determined without any suggestion that no answer to the complaint or petition had been filed by the employer, the petitioner cannot take any advantage of the failure to answer, if an answer was required, even under the rules of civil procedure. p. 647.
5. MASTER AND SERVANT.—*Workmen's Compensation Act.—Proceedings for Award.—Burden of Proof.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, by an injured servant against the employer, the burden is on the petitioner, as in ordinary civil actions, to show each of the facts necessary to entitle him to the benefits of the provisions of the act. p. 647.
6. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeals.—Presenting Questions for Review.—Sufficiency of Evidence.—Exception to Finding of Fact.*—The Workmen's Compensation Act, Acts 1915 p. 392, does not require or contemplate an exception to the finding of the Industrial Board to present the question of the sufficiency of the evidence to support the finding on appeal to the Appellate Court. p. 648.
7. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeals.—Relation of Master and Servant.—Finding of Board.*—

Conclusiveness.—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, where the evidence as to whether the applicant is an employe is conflicting, there being evidence showing or tending to show such relationship, it is the exclusive duty and province of the Industrial Board to weigh the evidence and draw any and all reasonable inferences therefrom, and its conclusion is final and not subject to review, but when the evidence affecting such question is undisputed and is reasonably susceptible of but a single inference, the question of what relation is shown to have existed is a law question. p. 649.

8. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeals.—Relationship of Master and Servant.—Question of Law.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, if there is no evidence showing the relationship of master and servant, or from which such relationship may reasonably be inferred, the court on appeal must apply the law to the facts, and hold as a matter of law that the relationship is not shown, although the Industrial Board has made a contrary finding. p. 649.
9. MASTER AND SERVANT.—*Relationship.—Independent Contractor.*—In determining whether the relation between the employer and the injured party is that of master and servant, employer and employe, or that of contractor and contractee, the controlling test is the right of control over the means, methods and manner of performing the work, and if the employer retains such right, he thereby creates the relation of employer and employe, but if the person employed is permitted to choose for himself the method and manner of doing the work and is permitted to select the persons to do it, free from the control of his employer, except as to the product or result of the work, he is an independent contractor. p. 652.
10. MASTER AND SERVANT.—*Workmen's Compensation Act.—Relationship of Master and Servant.—Sufficiency of Evidence.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, evidence that a contractor engaged a farmer to do hauling at odd times when not busy on his farm, the contractor stating at the time of employment that he would be away part of the time and that he wanted somebody to look after the hauling *and take it off his mind*, and while at work on the job the farmer saw the contractor on only one occasion, and the latter never gave any directions in reference to the work, except that he wanted the goods delivered, and never exercised any control over the farmer, who was paid sixty-five cents an hour per team, does not show the relation of employer and employe, but that the farmer was an

independent contractor, since the contractor in employing him reserved no control over the manner of doing the work. p. 653.

From the Industrial Board of Indiana.

Action for compensation under the Workmen's Compensation Act by J. O. Smock against H. F. Zeitlow. From an award, the defendant appeals. *Reversed.*

Charles E. Henderson, for appellant.

J. Fred Masters, for appellee.

HOTTEL, C. J.—This is an appeal from an award of the Industrial Board of Indiana against appellant and in favor of appellee, by the terms of which the latter was allowed fifteen weeks' compensation at the rate of \$9.90 a week, to be paid in a lump sum, \$15 for medical expenses, and costs. The award was made by the full board upon a review of the evidence produced at a prior hearing before one of its members.

Appellant has assigned as error that the award of the full board is contrary to law. Appellee contends: (1) That such assigned error presents no question, and (2) that because of its failure to file any answer in the proceeding before the Industrial Board, appellant has waived any defense which it may have had, that by such failure it confessed the averments of the complaint and nothing remained for the board to do but to "classify the injury and assess the amount of recovery."

The answer to appellee's first contention is furnished by the act of the legislature of 1917, amending §61 of the original Workmen's Compensation Act (Acts 1. 1917, ch. 63, §3) whereby the assignment of error, *supra*, is authorized and made effective for the purpose of presenting "both the sufficiency of the facts found to sustain the award, and the sufficiency of the evidence to sustain the finding of facts."

In answer to appellee's second contention, *supra*, appellant directs our attention to those provisions of §55

of the Workmen's Compensation Act, Acts 1915 p. 392, which provides that the procedure thereunder "shall be as summary and simple as reasonably may be," and that, for the purpose of carrying out the provisions of said act, the Industrial Board "may make rules not inconsistent with the act." In this connection appellant urges that said board has caused to be made and published throughout its jurisdiction a printed rule to the effect that no answer is required and, if none is filed, "the allegations contained in the application, petition or complaint will be deemed to be denied."

The rule relied on by appellant is not a part of the record in this case. It is true that the provisions,

supra, of the act in question authorized its promulgation, and this court will indulge every reasonable presumption in favor of the sustaining

2. of the award of said board; but, the fact that
3. such a rule was made and published by said board and in force at the time of the hearing of this case cannot be indulged in favor of the ac-
4. tion of said board, in the absence of anything in the record showing such fact. However, both

appellant and appellee appeared before said board and the cause was heard and determined without any suggestion or objection that no answer had been filed by appellant. Under such a state of facts the appellee would be in no position to take any advantage of appellant's failure to answer even under the rules governing civil procedure. *Train v. Gridley* (1871), 36 Ind. 241; *Taylor v. Short* (1872), 40 Ind. 506; *Stingley v. Second Nat. Bank, etc.* (1873), 42 Ind. 580; *Chambers v. Butcher* (1882), 82 Ind. 508.

In this connection, appellee also claims that appellant waived any defense he might have had because of his failure to introduce any evidence. In answer to

5. this contention, it is sufficient to say that cases

brought under the act in question do not differ from the ordinary civil action in the respect that the burden is on the petitioner to show each of the facts necessary to entitle him to the benefits of the provisions of the act. *Haskell, etc., Car Co. v. Brown* (1917), — Ind. App. —, 117 N. E. 555, and cases there cited. It appears in the instant case that the appellant was relying on the inability of the appellee to show that the relation of employe and employer existed between the two at the time appellee received the injury for which he was seeking compensation. It was not necessary, therefore, that appellant introduce any evidence, because if the evidence offered by appellee failed to show facts, from which such relationship might reasonably be inferred, he could not recover, and the question which appellant seeks to have decided by his appeal is whether the evidence is in fact sufficient to authorize said inference so drawn by the board. Before going to

6. this question we should add that appellee further insists that such question is not presented because of appellant's failure to except to the finding of said board. The act in question does not require or contemplate such an exception. *Union Sanitary Mfg. Co. v. Davis* (1916), 63 Ind. App. 548, 114 N. E. 872.

The record shows that appellant excepted to the award made by the board on review, and he challenges such award in this court as being contrary to

1. law. This, under the provisions of said act as amended in 1917, as indicated *supra*, requires us to determine both "the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts."

The Industrial Board has found as a fact that appellee at the time of his injury was in the service of appellant "as an employe"; that at such time appellee was employed by appellant in the usual course of his busi-

ness. This finding is challenged by appellant on the ground that there is no evidence to sustain it.

Appellee insists: First, that said question is one of fact and that the finding of the board is conclusive thereon and not subject to review, and that, in

7. any event, it was justified by the evidence. The first contention, subject to qualification, is correct; that is to say, in a case where the evidence affecting such question is conflicting, there being any evidence showing or tending to show such relationship, it is the exclusive duty and province of such board to weigh the evidence and draw any and all reasonable inferences therefrom, and its conclusion in such a case is final and not subject to review, but where the evidence affecting such question is undisputed and "is reasonably susceptible of but a single inference, the question of what relation is thereby shown to exist is a law question." *Columbia School Supply Co. v. Lewis* (1916), 63 Ind. App. 386, 115 N. E. 103, and cases there cited; *Dodge Mfg. Co. v. Kronewitter* (1914), 57 Ind. App. 190, 104 N. E. 99; *Board, etc. v. Bonebrake* (1896), 146 Ind. 311, 45 N. E. 470; *Lagler v. Roch* (1914), 57 Ind. App. 79, 104 N. E. 111. .

It follows that if there be no evidence showing said relationship, or from which such relationship may reasonably be inferred, this court must apply the

8. law to such state of facts and say as a matter of law that such relationship is not shown by the evidence, and in this sense such ultimate question is one of law.

As affecting this question, the evidence is, in substance, as follows: Appellee testified that he was injured on November 22, 1916, by the falling of a radiator, which he was unloading from a wagon, upon his thumb; that he was then working for appellant. (We quote.) "Q. Tell the court whether or not you were

regularly employed by him (meaning appellant) at that time? A. Yes, sir, I was. Q. And what was the nature of your duties? A. I was to haul any supplies that he might need for that building." He further testified that appellant was a steam contractor and had the plumbing contract—the steam contract—for a township consolidated school building then being erected in Marion county, Indiana. He required considerable hauling done in connection with his work. Appellee was a farmer, but his farm was not large enough to keep him employed all the time, and he did hauling at odd times, and when it would not interfere with his farming, and when he had nothing else particularly to do. About the times hereafter mentioned, he did hauling for the principal and other contractors who were engaged in the erection of said schoolhouse. Appellee had a talk with appellant who said "he was looking for some one to haul this stuff from the sidetrack, which is about * * * three miles * * * over, that he would be away part of the time and possibly part of the time would be there and he wanted somebody to look after it, take it off his mind. He said that I (appellee) had been recommended to him and that he wanted me to go ahead if I could and do the work. I told him I would do it to the best of my ability." There was no price then agreed upon for the work. Appellee owned his own team and wagon. He had another team and hired a driver for it to assist him in hauling for appellant. Appellee paid this driver. The latter was subject to appellee's control as to what he did. Appellee charged sixty-five cents per hour per team for this work, based on the time actually consumed. This time appellee entered in a small time book, in which he entered also the accounts of other people, including some of the contractors of the building for whom he did hauling. Appellee did hauling for appellant on the

following days: October 13, 19, 28; November 3, 22; December 9, 11, 12, 22, 24, 1916; January 19, 31, 1917. For this work appellee rendered statements on October 31, November 6 and 27, December 12 and 25, 1916, and on February 2, 1917. Appellant paid these amounts by check. Appellee did not haul any piece separately for appellant under a separate agreement, nor did he ever charge for the piece hauled. When delivering appellant's goods, appellee at no time delivered other goods on the same day for the other contractors. On November 22, appellee was unloading one of appellant's radiators from a wagon at said building. He was prying a radiator to get a crowbar under it when it slipped off the bar and crushed his thumb, severing a portion of the first phalange. Except once, appellant never saw appellee on the job prior to the injury. He did not direct how appellee should load the materials at the railroad station, or as to what road appellee should take, or as to the size of the load; nor did he exercise any control whatever over appellee. "He didn't make any instructions to what I should do or should not do except he wanted the goods delivered." Some days the work for appellant took only an hour. Appellant had nothing to do about what appellee did the rest of the day. In delivering these goods appellee used whatever road he pleased and did as he pleased about the method of loading and unloading. Neither appellant nor any of his representatives directed appellee how to load or unload these goods. Appellant testified that there was nothing said between him and appellee as to who should exercise control over the latter as to the manner of delivering these goods, that he never attempted to exercise any control over appellee, nor did any one, to appellant's knowledge, ever give appellee directions as to how he should make deliveries of the goods.

Is there any fact or facts shown by this evidence which will authorize the inference that at the time of appellee's injury he was an employe of appellant? The courts of appeal of this and other jurisdictions have been called upon frequently to determine the question here involved, and various tests, with more or less verbal variation, have been laid down by the courts as aids or guides in its determination, as will be evidenced from the following cases: *Good v. Johnson* (1906), 38 Colo. 440, 88 Pac. 439, 8 L. R. A. (N. S.) 896; *Powell v. Construction Co.* (1890), 88 Tenn. 692, 13 S. W. 691, 17 Am. St. 925; *Falender v. Blackwell* (1906), 39 Ind. App. 121, 79 N. E. 393; *Zimmerman v. Baur* (1894), 11 Ind. App. 607, 39 N. E. 299; *Indiana Iron Co. v. Cray* (1897), 19 Ind. App. 565; *Saunders v. City of Toronto* (1899), 26 Ont. App. 265; *Foster v. City of Chicago* (1902), 197 Ill. 264, 64 N. E. 322; *Riedel v. Moran, etc., Co.* (1894), 103 Mich. 262, 61 N. W. 509; *Wadsworth, etc., Co. v. Foster* (1893), 50 Ill. App. 513; *Schular v. Hudson River R. Co.* (1862), 38 Barb. (N. Y.) 653; *Bellatty v. Barrett Mfg. Co.* (D. C.) (1911), 192 Fed. 229; *Jahn's Admr. v. McKnight & Co.* (1904), 117 Ky. 655, 78 S. W. 862; *Shepard v. Jacobs* (1910), 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, 134 Am. St. 648; *Decatur R. Co. v. Industrial Board* (1917), 276 Ill. 473, 114 N. E. 915; *Green v. Soule* (1904), 145 Cal. 96, 78 Pac. 337; *Western Indemnity Co. v. Pillsbury* (1916), 172 Cal. 807, 159 Pac. 721; *Marion Shoe Co. v. Eppley* (1913), 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D 220; *Prest-O-Lite Co. v. Skeel* (1914), 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A 474.

While some other tests indicated in these decisions may have had more or less influence in particular cases, in determining whether the relation between the
9. employer and the injured party was that of mas-

ter and servant, employer and employe, or that of contractor and contractee, the test which seems to be recognized as controlling in all such cases, is the right of control over the means, methods and manner of performing the work; that is to say, if the employer retains such right he thereby creates the relation of employer and employe. If, on the other hand, the person employed is permitted to choose for himself the method and manner of doing the work and is permitted to select the persons to do it, free from the control of his employer in all matters connected with the doing of said work, except as to the product or result of the work, such person is an independent contractor. *Western Indemnity Co. v. Pillsbury, supra; Powell v. Construction Co., supra; Riedel v. Moran, etc., Co., supra; Wadsworth, etc., Co. v. Foster, supra; Jahn's Admr. v. McKnight & Co., supra; Marion Shoe Co. v. Eppley, supra; Prest-O-Lite Co. v. Skeel, supra.*

In the case last cited, on page 597, the Supreme Court expressly recognizes the controlling influence of said test in the following language: "An independent contractor is one exercising an independent employment under a contract to do certain work by his own methods, without subjection to the control of his employer except as to the product or result of the work. When the person employing may prescribe what shall be done, but not how it is to be done, or who is to do it, the person so employed is a contractor and not a servant. The fact that the work is to be done under the direction and to the satisfaction of certain persons representing the employer, does not render the person contracted with to do the work a servant."

We find nothing in the evidence in this case which shows that appellant, when he hired appellee, reserved any right to control either the manner or method of doing the work that appellee was doing

when injured, nor did appellant reserve to himself any right to select the men who did the work, or to furnish, or in any way control the character of the equipment with which it was to be done. On the contrary, it affirmatively appears from appellee's testimony that he was engaged in hauling at odd times when not busy on his farm, that appellant told him that he had been recommended to appellant to do said work, and told him when he employed him to do the work that he would be away part of the time, that "*he wanted somebody to look after it, take it off his mind.*" In response, appellee said that he would do it to the best of his ability. Under this arrangement he undertook the work and did it with his own teams, with the assistance of a driver selected by him and under his control. After he began the work he never saw the appellant on the job but once, and appellant never gave appellee any direction, never *exercised any control* whatever over appellee and "*gave him no instruction except he wanted the goods delivered.*"

Appellee insists in effect that the mere fact that appellant did not exercise the right to direct or control the method, manner, means, or time of doing said work is not of controlling importance; that it is the right to exercise such control which creates the relation of employer and employe. This is probably true, but the evidence here fails to show the reservation of such right by appellant, and the only evidence which can be said to throw any light upon such question is that which shows an absence of the exercise of such control by appellant, and an exercise of the right of such control by appellee. To our minds the evidence is susceptible of but one inference, viz., that the relation which appellee sustained to appellant when injured was that of an independent contractor. It, in any event, fails to show the

relation of employer and employe, and hence the award of the Industrial Board must be, and is, reversed.

NOTE.—Reported in 117 N. E. 665. Workmen's compensation: whether independent contractors and employes of subcontractors are employes within meaning of acts, L. R. A. 1916A 118, 247, L. R. A. 1917D 148; procedure under act, applicability of rules governing actions generally, Ann. Cas. 1915A 741; review of facts on appeal under act, Ann. Cas. 1916B 475, 1918B 647; occupations or employments within purview of acts, Ann. Cas 1917D 4. See under (9) 26 Cyc 970.

BUSICK ET AL. v. BUSICK ET AL.

[No. 9,681. Filed April 6, 1917. Rehearing denied June 29, 1917. Transfer denied November 16, 1917.]

1. *WILLS.—Construction.—Intention of Testator.*—The purpose of construing a will is to give effect to the intention of the testator as expressed by the language employed, if not inconsistent with established principles of law, but where the intention is plain there is no construction required. p. 664.
2. *WILLS.—Construction.—Ambiguity.—Application of Rules of Construction.*—A will devising certain real estate to testator's son for life and providing that "at his death the same shall vest in and equally belong to his lawful children, who may survive him," and, if such son should die, "leaving no children alive at such time, then I will and direct that such real estate shall revert to my estate," to be disposed of as directed in a subsequent item, providing for the distribution of property not specifically disposed of by the will, and that the realty devised to the son, in case he died without children, should "descend and pass" in the manner set forth in such item, is ambiguous as to when the title vests in the life tenant's children so as to require the court to determine its construction from a consideration of all its provisions to ascertain the testator's intention. pp. 665, 669.
3. *WILLS.—Construction.—"Vest."*—The word "vest" may denote either a vesting in interest, or a vesting in possession. p. 668.
4. *WILLS.—Construction.—"Revert."*—The word "revert" may be used in the sense of "go" or "pass." p. 669.
5. *WILLS.—Construction.—Descend.*—The word "descend" may be used in the sense of "go" and will be so construed where that meaning more effectually carries out the intention of the testator. p. 669.
6. *WILLS.—Construction.—Vesting of Estates.*—The law so

favours the vesting of estates at the earliest opportunity and is so averse to a postponement thereof that they will be deemed as vesting at the earliest possible period in the absence of a clear manifestation of the contrary intention. p. 670.

7. *WILLS.—Construction.—Words of Postponement.—Words of Survivorship.*—Words of postponement in a will are presumed to relate to the beginning of the enjoyment of the estate, rather than to its vesting, and words of survivorship are presumed to relate to the death of the testator, rather than to that of the first taker, if they are fairly capable of such interpretation. p. 671.
8. *WILLS.—Construction.—Limitations.—Remainders.*—A limitation in a will will not be construed as an executory devise when it can take effect as a remainder, nor a remainder to be contingent where it can be taken as vested. p. 671.
9. *WILLS.—Construction.—Life Estate with Limitation Over.—Vesting of Estate.*—An item of a will devising a life estate in certain lands to testator's son and providing that at his death the "same shall vest in and equally belong to his lawful children, who may survive him" and that the land devised shall revert to the estate if the life tenant die leaving no children, creates a life estate, with the remainder in fee to the life tenant's children living at the time of the testator's death, subject to a diminution of their shares to let in children subsequently born during the life tenancy, and on the death of such children before their parents, the latter acquired the fee-simple title to the realty devised. p. 675.
10. *TRIAL.—Dismissal as to Certain Parties.—Findings and Conclusions of Law.*—Where an action to quiet title was dismissed as to certain defendants, findings of fact and conclusions of law as to such parties are outside the issues and unwarranted. p. 675.
11. *JUDGMENT.—Conclusiveness.*—In an action to quiet title to lands devised by will, plaintiffs were bound neither by a decree in an action to construe certain items of the will, where the decree stipulated that it should not be conclusive, nor by the judgment in a proceeding to construe another item wherein certain defendants, although parties in interest to such proceedings, were not made parties thereto. p. 676.

From Wabash Circuit Court; *Charles A. Cole*, Special Judge.

Action by Gillen D. Busick and others against Kate M. Busick and others. From a judgment rendered, plaintiffs appeal. *Reversed.*

Elias D. Salsbury, Frank S. Roby and Walter S. Bent, for appellants.

Warren G. Sayre and H. N. Hipskind, for appellees.

FELT, C. J.—This suit was brought by appellants against appellees to quiet the title to certain real estate in Wabash and Huntington counties, Indiana. Issues were formed by a general denial to the complaint and by an agreement that all defenses might be made under such denial. On due request the court made a special finding of facts and stated conclusions of law thereon, which were in favor of appellees. The judgment follows the conclusions of law. The errors assigned question the correctness of each of the conclusions of law.

The facts found are in substance as follows: Joseph W. Busick died testate on March 8, 1897, leaving surviving him his wife, Kate M. Busick, his daughter Marguerite Bailey, the child of Kate M. Busick, and his son Gillen D. Busick by a former wife, and Allen G. Busick, an adopted son. The will was executed October 16, 1896, and was duly probated in the Wabash Circuit Court on March 12, 1897, and as far as material here provides in substance as follows: In item 1 the testator bequeathes to his wife his household goods, furniture and library. Item 2 directs his executors to make an inventory of all his property except that devised by item 1, and to cause the same to be appraised at its cash value, but provides that for the purposes of distribution under the will certain real estate shall be taken at the value fixed by the testator, and the item also directs the payment of all just debts of the testator. Item 3 forgives and eliminates from his estate all advancements made to his sons, and directs that an advancement of \$9,000 made to his daughter be charged against her, and that all other debts due him from her be forgiven. Items 4, 5 and 6 describe various lots and

tracts of real estate and fix the value at which they are to be taken by the legatees under the will. Item 7 devises and bequeaths to the testator's wife, Kate M. Busick, his residence valued at \$8,500, a storeroom and lot valued at \$11,000, and a sufficient amount of other property to be selected by her at the appraised value, sufficient to make the whole amount of property received by her equal in value to one-third of the entire estate. Item 8 is as follows:

"I will and devise to my son, Gillen D. Busick, the west farm containing 274 acres, and the Chase property on Manchester avenue in the city of Wabash, all in Wabash County, Indiana, and by me valued at Sixteen Thousand and Seven Hundred Dollars, and more fully described in Item 6 above to have and to use the same, and the rents and profits thereof during the full period of his natural life, and at his death the same shall vest in and equally belong to his lawful children, who may survive him, and in case my said son, Gillen D. Busick, die, leaving no children alive at such time, then I will and direct that said real estate shall revert to my estate and be disposed of as provided in Item 10, hereinafter set out."

Item 9 devises certain specified property to Marguerite Bailey under the same conditions and by the same provisions as those of item 8. By item 10 the testator gives certain directions for setting off to his wife the property devised to her and to his children the property devised to them, and then provides that his property not specifically disposed of by the will shall be reduced to cash or securities by his executors, and that they—

"shall keep the same, to the best advantage invested in interest-bearing securities one-half thereof for the benefit and use of my said son Gillen D. Busick, and one-half thereof for the benefit of my daughter Marguerite, to be held in trust for each of them, and the one-tenth part of the same, and the annual interest on the whole of such half, less the actual and necessary expense be paid to

each, each year, the whole of each one's share being paid to them in ten years, should they live so long, but in case of the death of either or both before such ten years shall have elapsed leaving children surviving them, then in such case, the amount unpaid shall be put at interest for the benefit of the surviving children, and the interest thereon used for their maintenance, and the principal of such share shall be equally divided among such children as they reach the age of twenty-one years, and should none of the children of my daughter Marguerite live to the age of twenty-one years, then the children of my son Gillen D. Busick who live to the age of twenty-one years, shall be paid the entire portion remaining, and should none of the children of Gillen D. Busick live to the age of 21 years and the children of my daughter Marguerite reach the age of 21 years, then in such case the entire portion remaining shall belong to her children, and in the event of the death of both of said Gillen D. and said Marguerite, leaving no children surviving them, then whatever remains of my estate at such time shall be divided into two equal parts, one part to my wife Kate M. Busick, if she be living, and the other part to be divided equally between the children of my brother E. D. Busick, and those of my sister Mary Garron and if my said wife be not living at such time, then all shall be divided between the children of my said brother and sister one-half to each family.

"And I further will and direct that the real estate heretofore described and willed to my said son and daughter under conditions expressed shall in case they die without living children, shall in such case descend and pass in precisely the same manner and course as set out above in this item in reference to personal property under the same condition."

By item 14, \$1,000 is devised to Allen G. Busick, the adopted son. In item 15 the testator describes certain real estate owned by him in Huntington county, Indiana, and then provides that:

"Now in order to make the amount of land set apart for use of my said children more nearly equal

in value than as hereinabove set forth, I will and direct that the above and foregoing described land in Huntington county, Indiana, in addition to land named and described in item 8 above set apart for the use of my said son Gillen D. Busick, in exactly the same way as other land devised to him, with this further condition that the 33 acres be his absolutely in fee simple, and the remainder may be sold at any time by my executors and the amount realized therefrom be added by them to his share of personal property, and then take precisely the same course as other personal property devised by me for his use, and the above tract shall be set aside for his use and added to his interest prior to the division provided for in item 10 above."

The court also found that the testator was at the time of his death the owner in fee simple of the real estate devised by him and that the appraised value of his estate was \$109,043.55; that his widow elected to take under the will; that the three executors named in the will duly qualified but two resigned, leaving Kate M. Busick, sole executrix; that the estate was settled and the executrix duly discharged on April 19, 1900; that at the time of the making of the will and of the testator's death Gillen D. Busick was thirty-six years of age and had an expectancy of thirty to thirty-one years according to the Carlisle tables of mortality, and Marguerite Bailey was thirty years of age; that at the time of the death of the testator Gillen D. Busick had two children living, Josephine Busick, born on December 31, 1886, and who at the death of the testator had an expectancy of forty-eight to forty-nine years, and who died intestate on June 11, 1897; LaMoine Busick, his son, born June 12, 1888, who at the death of the testator had an expectancy of fifty to fifty-one years, and who died intestate on August 21, 1908; that said Josephine left surviving her as her only heirs at law, her father and mother aforesaid, and her brother, LaMoine Busick; that LaMoine Busick died unmarried

leaving as his only heirs at law his mother, Kate M. Busick, and his father, Gillen D. Busick; that the trust created by item 10 of the testator's will was finally settled on or 'about November 26, 1907, and the trustee fully discharged; that on November 1, 1908, Gillen D. Busick commenced a proceeding in the Wabash Circuit Court to construe item 15 of said will and made parties thereto Kate M. Busick, executrix, Kate Busick, Marguerite Bailey, Robert Bailey, and LaMoine Busick, and upon issues joined the court decreed that the executors were invested with discretionary power, and having refused to sell the land, the "plaintiff takes under the terms of item 15 of said will, a life estate in said lands and that the remainder goes in the same manner as the other lands devised to the plaintiff under the terms of said will as set out in item 8 thereof; that said decree was not appealed from and still remains in force"; that on February 14, 1912, Gillen D. Busick and Rose M. Busick filed their complaint in the Wabash Circuit Court, to quiet title to the lands described in item 8 aforesaid making defendants thereto the defendants to this suit; that a cross-complaint was filed in said suit by a party claiming an interest in the land and thereafter the complaint was dismissed, and on April 8, 1913, by agreement of the parties, a receiver was appointed to lease the real estate, collect rents and pay taxes, costs and charges, and the order appointing such receiver provides that "this decree and stipulation shall at no time become or be construed as an adjudication of any question of law or fact or as an adjudication of any issue raised by the pleadings filed or evidence given in this cause"; that said real estate had been sold for taxes and said receiver was ordered to settle the taxes and obtain quit-claim deeds from the parties holding such tax liens, which deeds were to be made to Gillen D. Busick and others claiming an interest in the

land and such quit-claim deeds were by such order of court to provide "that redemption from said sales is made by the receiver by order of court, for the benefit of all parties interested in said real estate." The finding sets out facts to show that the receiver carried out the order of the court; that when the farm of 274 acres was sold for taxes it was listed in the name of Gillen D. and Rose M. Busick, and the real estate in the city was listed for taxes in the name of Rose M. Busick, trustee; that when he made his will the testator had the advice and counsel of Oliver H. Bogue, a practicing attorney, who also wrote said will; that the defendants each claim some right, title, or interest to the real estate described in the complaint or in some part thereof, which claims are adverse to and inconsistent with "plaintiff's title to said real estate in fee simple." The finding sets out the names of the defendants and their relationship and shows their interest in the litigation and their claims to title in all or certain portions of the real estate in controversy. It also shows that on April 14, 1911, Gillen D. Busick leased the Huntington county farm known as the "Grundy farm" to Michael and Margaret Shannahan for a period of five years for \$500 and on November 7, 1911, executed to said lessees a quit-claim deed therefor, and received a total consideration for such lease and deed the sum of \$800; that Rose M. Busick did not join in the execution of either the deed or lease aforesaid. The findings also show certain conveyances by Gillen D. to Rose M. Busick.

On the foregoing finding of facts the court stated its conclusions of law in substance as follows: (1) That under the will of Joseph W. Busick, Gillen D. Busick became the owner of a life estate in the real estate described in the complaint and such estate is still held by him and Rose M. Busick, as grantees under conveyances aforesaid, except the "Grundy" Huntington

county farm. (2) "That the said LaMoine Busick and Josephine Busick did not nor did either of them take under the said will of Joseph W. Busick or hold at the time of their respective deaths, any indefeasible estate of inheritance in the real estate described in plaintiff's complaint." (3) "That the plaintiffs, Gillen D. Busick and Rose M. Busick did not inherit from their said son, LaMoine Busick or their daughter, Josephine Busick, any interest in the said real estate or any part thereof, in fee simple." (4) That Michael and Margaret Shannahan are the owners and in possession under the lease and deed from Gillen D. Busick of the Huntington county farm, known as the "Grundy" farm for the period of the life of said Busick, except 33 acres conveyed by Gillen D. Busick to John C. McAlpine. (5) "That the defendants, Kate M. Busick, Emily Caffee, Mame D. Robbins, Charles C. Busick, Emery D. Busick, John W. Busick, Ida J. Logan, Bell Mathews, Claude Caffee, Arlie Caffee, Edward Gehring, Roland Gehring, Joseph Gehring, Bird Wilson and the unknown heirs of Bird Wilson, are entitled to take said real estate in fee simple under the said will of Joseph W. Busick on the death of said Gillen D. Busick, leaving no children surviving him." (6) "That the plaintiffs are not entitled to have their title to said real estate in fee simple quieted against the defendants herein."

The controversy between appellants and appellees centers in item 8 of the will of Joseph W. Busick and involves other portions of the will which are related thereto. Appellants contend that the eighth clause of the will devises a life estate in the real estate therein mentioned to Gillen D. Busick, with a remainder in fee to his children which vested at the time of the death of the testator, subject to such life estate; that at the death of such children, subsequent to the death of the testator, appellants inherited title from them.

The trial court held that the children of Gillen D. Busick living at the time of the death of the testator did not acquire an indefeasible estate of inheritance in the real estate mentioned in item 8, and consequently appellants, at the death of such children, subsequent to the death of the testator, did not inherit title from them.

In support of the judgment of the trial court, appellees assert that the will is unambiguous, and that the plain meaning of its provisions clearly indicate that the intention of the testator was followed and given effect by the conclusions of law and the judgment rendered thereon; that by the use of the words "vest" and "revert" the testator employed terms of definite legal signification which so clearly indicate his intention as to leave no room for the application of rules of construction in construing the will.

We shall first examine the provisions of the will to determine whether in construing it there is any necessity for resorting to rules of construction, or whether the provisions so clearly and plainly indicate the intention of the testator as to make the application of rules of construction improper and unnecessary.

The purpose of construing any will is to ascertain and give effect to the intention of the testator as expressed by the language employed, if not inconsistent

1. with established principles of law. Where the intention is plain and so clearly expressed as to be readily ascertained by a consideration of all the provisions of the will, there is no need of resorting to rules, for no construction is required and all that remains to be done is to execute the expressed intentions of the testator. *Alsman v. Walters* (1915), 184 Ind. 565, 106 N. E. 879, 111 N. E. 921; *Smith v. Smith* (1915), 59 Ind. App. 169, 173, 109 N. E. 60; *Hillis v. Dils* (1913), 53 Ind. App. 576, 580, 100 N. E. 1047, 102 N. E. 140.

In the first clause of the will the testator expresses

the intention of disposing of his "entire estate, both real and personal," and in item 11 the same idea is

2. expressed. The testator therein states that the foregoing provisions relating to personal property are subject to the payment of his just debts, including expenses of last sickness, funeral, and costs of administration and then says: "Whatever may then remain shall be considered my estate of which my said wife shall have one-third, and the two-thirds to the children and all costs, expenses and taxes affecting the portions set off to my said children shall be paid from such portions."

The will shows that the testator had a wife, two natural children and an adopted son, living when the instrument was executed, and at the time of his death, to whom he devised certain real estate and made bequests of personal property. He also made provision for his grandchildren and for collateral kindred, the children of his brother and sister, under certain named conditions. The will indicated that certain amounts of money had previously been paid to each, the natural and adopted son, and all such amounts were forgiven. By item 14 the adopted son was bequeathed the sum of \$1,000. All sums previously paid the daughter were forgiven except an advancement of \$9,000. The latter portions of items 8 and 9 indicate an intention to have the property devised to his son and daughter stay in the natural family, and follow the blood of the direct line, and upon failure of such line, to go to collateral kindred, the children of his brother and sister. These provisions, taken in connection with the provision made for his adopted son, indicate that the amounts forgiven and the specific bequest to the adopted son include all the testator intended him to recover from his estate in any event and at any time.

Eliminating the adopted son in the manner above in-

licated, the general scheme of the will indicates an intention to make provision for the objects of the testator's bounty in the order following, viz.: (1) His wife; (2) his son and daughter; (3) his grandchildren; (4) the children of his brother and sister.

The language of item 8, "and in case my said son, Gillen D. Busick, *die, leaving no children alive at such time*, (our italics) then I will and direct that said real estate shall revert to my estate and be disposed of as provided in item 10," does not definitely indicate whether the death of the son therein mentioned refers to his death in the lifetime of the testator, or at some time subsequent to the death of the testator, or to such death without any reference to the time of the death of the testator. The same is true of the language of item 9 by which property is devised to the daughter, Marguerite Bailey.

The concluding sentences of items 8 and 9 refer to item 10, which provides that the real estate devised to his son and daughter, under certain conditions, shall "*in case they die* without living children * * *, descend and pass in precisely the same manner and course as set out above in this item in reference to personal property under the same condition." Here again the will is indefinite as to whether the death of the son or daughter therein mentioned refers to such death in the lifetime of the testator, or means such death at any time without reference to the death of the testator.

If the intention of the testator was primarily to dispose of all his estate to the objects of his bounty, in any contingency that might arise, and to so frame his will that in any event that might arise his adopted son would not receive any part of his estate except the portion bequeathed to him by the will, then it is apparent that the language of the latter part of items 8, 9, and 10 is appropriate to make effective such intention. For

if all the devisees named in items 8 and 9 should have died in the lifetime of the testator, then without the reference to item 10 in items 8 and 9 and the provisions of item 10 above mentioned such devises would have lapsed and the adopted son, if living, would have obtained an interest by inheritance in the property devised by said items 8 and 9.

If the testator intended to provide for conditions that would arise if the devisees named in items 8 and 9, or either of them, should die in his lifetime, then the language used in the latter part of item 10 would be appropriate, for in that event the property mentioned in items 8 and 9, or either of them, would "*descend*" from him at his death, whereas, if reference was to a death subsequent to the death of the testator, title could not then "*descend*" from him, for under such interpretation title would have passed to some devisee or devisees under the will, and "*descend*" would not be an apt or appropriate word to express the apparent intention under such interpretation. 3 Words and Phrases 2012. Assuming that the word "*descend*" was used advisedly, as we must do if there is nothing to indicate that it was not so used, it tends to indicate a reference in the latter part of item 10 to a death in the lifetime of the testator.

Furthermore, the provision in the latter part of item 10 to the effect that such property shall pass "in precisely the same manner and course as set out above in this item in reference to personal property under the same condition," tends to render doubtful the conclusion that the testator intended to defer the vesting of title in fee to the property devised by items 8 and 9 until the death of his son and daughter at a time subsequent to his own death.

But appellees further contend that all doubt or ambiguity is removed by the use of the words "*vest*" and "*revert*."

The Century Dictionary indicates that the word "vest" has various meanings and applications, among them the following: (a) "To put in possession;

3. to put more or less formally in occupation." (b)

"To place or put in possession or at the disposal of; give or confer formally or legally an immediate fixed right of present or future possession, occupancy or enjoyment of"; (c) "To come or descend; devolve, take effect as a title or right." (d) "*To vest in interest*, to pass or devolve as matter of right or title irrespective of any immediate right of possession." (e) "*To vest in possession*, to pass in possession or immediate right of possession." The word has been defined to signify an immediate right of present or future enjoyment. *Stewart v. Harriman* (1875), 56 N. H. 25, 29, 22 Am. Rep. 408; 8 Words and Phrases 7302. In some instances the word has been held to have been used in the sense of "payable." *Phillips' Estate* (1903), 205 Pa. 504, 55 Atl. 210, 211, 97 Am. St. 743. The word "vest" may denote either a vesting in interest, or a vesting in possession. 8 Words and Phrases 7302; *Burney v. Arnold* (1909), 134 Ga. 141, 148, 67 S. E. 712; *Jacobs v. Whitney* (1910), 205 Mass. 477, 481, 91 N. E. 1009, 1011, 18 Ann. Cas. 576; *Loventhal v. Home Ins. Co.* (1895), 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. 17, 20; *McGillis v. McGillis* (1896), 11 App. Div. 359, 42 N. Y. Sup. 921, 924; *Hennessy v. Patterson* (1881), 85 N. Y. 91, 103. In *Burney v. Arnold*, *supra*, the Supreme Court of Georgia said: "Counsel in the present case insists, however, that, there being no remainder created in the deed except by the words 'at her death to go and vest in,' etc., the use of the additional words 'and vest in,' must necessarily have been employed to convey some meaning, and since the words 'to go' are sufficient to indicate the idea of carrying the possession, the words 'and vest in' must be construed

as expressing an intention of the grantor that there should be no vesting in interest until the death of the life-tenant. While this argument is a plausible one, in arriving at the intent of the grantor it must be borne in mind that the word 'vest' has a double meaning; it is employed to denote either 'a vesting in interest,' or 'a vesting in possession.' If employed by the grantor in the latter sense, it would have no further effect than if the grantor had declared that the property at the death of the life-tenant was 'to go to and be possessed by' the remaindermen." In *Hennessey v. Patterson*, *supra*, the New York Court of Appeals said: "In his chapter on executory devises Washburn reminds us of the necessity of distinguishing 'between the vesting of a *right* to a future estate of freehold, the vesting of a *freehold estate* in interest, and the vesting of the same in possession.'"

The word "revert" is not always used in the same sense, and is sometimes used in the sense of "go"

4. or "pass." *Warrum v. White* (1908), 171 Ind. 574, 578, 86 N. E. 959. Likewise the word "descend" is sometimes used in the sense of "go"
5. and will be held to have been so used where such meaning seems to more effectually carry out the intention of the testator. *Borgner v. Brown* (1893), 133 Ind. 391, 396, 33 N. E. 92; *Rountree v. Pursell* (1895), 11 Ind. App. 522, 532, 39 N. E. 747.

While the foregoing observations are not the only considerations suggested by the various provisions of the will, and others may be apparent which tend

2. to support the conclusions of the trial court, we nevertheless believe the observations above made are amply sufficient to warrant the conclusion that the intention of the testator to defer the vesting of title in the children of his son and daughter, until the death of the latter at any time, is not so clearly apparent from

the provisions of the will as to remove all doubt that such was his intention.

We therefore conclude that there is such ambiguity in the provisions of the will that the policy of the law makes it our duty to invoke the established rules of construction to aid the court in ascertaining and giving effect to the intention of the testator as gathered from a due consideration of all the provisions of the will. *Alsman v. Walters, supra*; *Aldred v. Sylvester* (1915), 184 Ind. 542, 111 N. E. 914, 916; *Smith v. Smith, supra*.

The finding of facts shows that the testator in making his will had the advice of a lawyer who also wrote the will. The instrument bears date of October 16, 1896, and shortly prior thereto some important decisions had been rendered by the Supreme Court of this state, which deal with questions that arise under the provisions of the will now under consideration. *Fowler v. Duhme* (1896), 143 Ind. 248, 42 N. E. 623; *Tindall v. Miller* (1896), 143 Ind. 337, 41 N. E. 535; *Moores v. Hare* (1896), 144 Ind. 573, 43 N. E. 870; *Antioch College, etc. v. Branson* (1896), 145 Ind. 312, 44 N. E. 314; *Heilman v. Heilman* (1891), 129 Ind. 59, 28 N. E. 310; *Borgner v. Brown, supra*.

The rules of construction applicable to the case at bar have been stated and reiterated many times. There is little, if any, dispute as to such rules and the controversy usually arises in determining the necessity for their application, and in applying them to particular cases. Our Supreme Court, in the case of *Aldred v. Sylvester, supra*, recently made a terse statement of the principle rules applicable here as follows: "This court has with practical uniformity and consistency recognized the existence of the following rules where particular and future estates are created: (1) the law so favors the vesting of estates at the earliest opportunity and is so adverse to a postponement

thereof that they will be deemed as vesting at the earliest possible period, in the absence of a

7. *clear manifestation* of the contrary intention;

(2) words of postponement are presumed to relate to the beginning of the enjoyment of the estate, rather than to its vesting; (3) words of survivorship are presumed to relate to the death of testator, rather than that of the first taker, if they are fairly capable of such interpretation. *Aspey v. Lewis* (1899), 152 Ind. 493, 52 N. E. 756; *Myers v. Carney* (1908), 171 Ind. 379, 84 N. E. 400; *Fowler v. Duhme* (1896), 143 Ind. 248, 42 N. E. 623; *Campbell v. Bradford* (1906), 166 Ind. 451, 77 N. E. 849; *Taylor v. Stephens, supra*; *Moore v. Hare* (1896), 144 Ind. 573, 43 N. E. 870; *Tindall v. Miller* (1896), 143 Ind. 337, 41 N. E. 535; *Borgner v. Brown* (1893), 133 Ind. 391, 33 N. E. 92; *Wright v. Charley* (1891), 129 Ind. 257, 28 N. E. 706; *Heilman v. Heilman* (1891), 129 Ind. 59, 28 N. E. 310; *Bruce v. Bissel* (1889), 119 Ind. 525, 22 N. E. 4, 12 Am. St. 436; *Amos v. Amos* (1889), 117 Ind. 19, 19 N. E. 539; *Hoover v. Hoover* (1888), 116 Ind. 498, 19 N. E. 468; *Harris v. Carpenter* (1887), 109 Ind. 540, 10 N. E. 422; *Davidson v. Koehler* (1881), 76 Ind. 398; *Rumsey v. Durham* (1854), 5 Ind. 71.

"It is also well settled by our decisions that courts will not construe a limitation into an executory devise when it can take effect as a remainder nor a re-

8. mainder to be contingent where it can be taken as vested. *Fowler v. Duhme, supra*, 267; *Carnahan v. Freeman* (1915), 108 N. E. 955; *Moore v. Lyons* (1840), 25 Wend. 119."

Without repeating here, we adopt as pertinent to the case at bar the recent exhaustive review of the decisions and authorities by our Supreme Court in the following cases: *Alsman v. Walters, supra*; *Aldred v. Sylvester, supra*.

Fowler v. Duhme, supra, is a leading case on the subject now under consideration, has been cited and followed in many decisions, and is of special importance here because of the similarity in meaning of the language employed in the will under consideration in that case, to that over which the controversy arises here. In that case the testator devised the residue of his estate to his children subject to the following conditions, viz.—“(a) In the event of the death of any of my said children without lawful issue *living at the time of the death of such child*, then the share of such deceased child shall vest in, and become the absolute property in fee simple, in equal portions, of such of my said children as shall then be living, and the living descendants of such, if any, as may then be dead, the descendants of any deceased child taking, between them, the share which, if living, would have vested in their father or mother.”

In that case it was contended by Mrs. Duhme, a daughter of the testator, that she acquired a fee-simple title to the property devised to her and that clause “a” had reference only to a death occurring in the lifetime of the testator. Those opposing her contended that such clause referred to death after the death of the testator and that Mrs. Duhme’s title was a determinable fee, which in case she died without issue living, would determine, and that in such event the fee-simple title was limited over by executory devise to certain designated persons.

After an exhaustive review of the subject and authorities, the court held that the children of the testator took a fee-simple title which vested absolutely at the testator’s death.

In discussing clause “a” the Supreme Court said: “It expresses a contingency in which the property devised should go to others than the named devisees, but omits to state the time within which such contingency

must happen. The law supplies that omission by holding that the time shall be directed to a period before the testator's death. If the clause read: 'In the event of the death,' before my death, 'of any of my said children,' etc., there could be no reasonable ground of contention, and, as we have seen, the law supplies these words where to do so they do not oppose the manifest intention of the testator. Here, as in *Boraston's Appeal, supra*; *Moore v. Lyons, supra*; *Doe v. Sparrow, supra*; *Woodburne v. Woodburne, supra*, and *Mickley's Appeal*, counsel attach considerable importance to the adverb of time *then*, as employed in the clause in question, and seek to refer it to the death, at any time, of the immediate devisee. Such words are held by the cases cited not to relate to the vesting of the estate in interest. The word as employed has direct reference to an event, the death of a child, and not to a time. This use of the word is consistent with the construction of the clause which requires us to apply the rule of survivorship to a period during the lifetime of the testator, it is consistent with the idea that a will speaks with reference to conditions which may exist at the time of the testator's death, it is consistent with the closing phrase of the clause: 'The descendants of any deceased child taking between them the share which, if living, would have vested in their father or mother.' *Vesting* occurs at the death of a testator and not before.

"The word, as it is each time employed, is not inconsistent with the idea of a contingency, the death of a child, occurring during the lifetime of the testator, and as we have seen it must be found inconsistent with that idea before we could give it effect to deny the application of the rule directing the time of indefinitely expressed survivorship."

In *Alsman v. Walters, supra*, the language of the de-

wise considered was: "I give and bequeath to my son, Francis M. Walters, during his natural life and after his death to his children surviving him in fee simple."

In considering the meaning and effect of the foregoing language the court said: "Where a life estate is carved out, with a gift over to children of the life tenant, the gift not only embraces the children living at testator's death, but also all who may come into existence during the life tenancy. In such case, the children alive at testator's death take an immediately vested interest subject to a diminution of their shares to let in such others as may be born during the life tenancy.

* * * It will be observed here that while the testator makes the gift, after the death of Francis, 'to his children surviving him' the estate devised is a 'fee simple.' * * *

In ascertaining the testator's intent consideration must be given to all the words in the will, and a court is not at liberty to heed one phrase and disregard another. * * *

The cases cited discuss the rules of construction to which we have referred. These rules are not mere arbitrary formalities. They have been formulated to aid in the ascertainment of the testator's true intent and prevent its subversion by ascribing a meaning to a word, perhaps carelessly used, which conflicts with the general intent of the testator.

Aspy v. Lewis, supra. They are the product of wisdom and experience of the ages in seeking amid ambiguous phrases, the intent of those engaged in the serious and solemn business of making a final disposition of property by will. * * * We are of the opinion that on the death of Luke Walters the fee simple title to the land in question vested absolutely in appellee and appellant's mother, subject to diminution to let in after-born children."

The language of the devise in the will considered in *Smith v. Smith, supra*, and the facts of the case give it

weight and special significance when applied to the facts of this case and the language of the devise now under investigation.

In the light of the foregoing decisions, and the numerous cases therein cited, and especially the more recent decisions of our Supreme Court, we hold that

9. by clause 8 of the will of Joseph W. Busick, deceased, he devised a life estate to his son Gillen D. Busick, in the real estate therein mentioned and described, and the remainder in fee to the children of Gillen D. living at the time of the death of the testator, subject to a diminution of their shares to let in other children of Gillen D., if any, born during the life tenancy. *Alsman v. Walters, supra. Coquillard v. Coquillard* (1916), 62 Ind. App. 489, 113 N. E. 481, 483.

From this it follows that upon the death of the children of Gillen D. and Rose M. Busick as found by the trial court, their parents, the appellants, inherited from them title to the real estate mentioned and described in items 6 and 8 of said will, and by virtue thereof, and of the conveyances found by the court, hold the fee-simple title to said real estate in the proportions found by the trial court, except such interests or portions thereof as may have been conveyed subsequently to the death of the children aforesaid.

The complaint having been dismissed by appellants as to Michael and Margaret Shannahan, the find-

10. ing of facts as to them is outside the issues and the fourth conclusion of law was unwarranted.

Our conclusions already announced indicate that the appellees, the children and descendants, or representatives, of the brother and sister of the testator mentioned in item 10 of the will, have not now, nor can they on the facts found by the court, by virtue of the provisions of said will, ever obtain any interest in the real estate in controversy.

The contention that appellants are bound by the construction placed on the will by the parties in interest cannot be sustained on the facts found by the
11. trial court. In one instance mentioned in the finding of facts on which this contention is based, it is shown that by agreement of the parties and by the order and decree of the court, it was definitely settled that no such result should follow.

In the proceedings to construe item 15 of the will, the parties here claiming adversely to appellants were not parties, for the finding shows that Kate M. Busick, executrix, Kate Busick, the widow of the testator, Marguerite Bailey, daughter of the testator, Robert Bailey and LaMoine Busick, were the only parties, none of whom are claiming adversely to appellants. Furthermore, the provisions of items 8 and 9 were not construed, nor was the intention of the testator, as evidenced by a consideration of the whole will settled or adjudicated. The dealings with the Shannahans, as already shown, were not in issue and in any view of such facts they are not sufficient to preclude appellants from asserting their rights as against the claims of the appellees.

Other questions discussed are disposed of by the conclusions already announced, and there is no necessity for giving them further consideration.

From the conclusions we have reached, it follows that the trial court erred in each of its conclusions of law.

The judgment is therefore reversed, with instructions to the trial court to restate its conclusions of law, in favor of appellants, and in accordance with the conclusions above announced, and to render judgment thereon accordingly.

Ibach, P. J., Dausman, Caldwell, Batman and Hottel, JJ., concur.

Makeever v. Makeever—65 Ind. App. 677.

ON PETITION FOR REHEARING.

DAUSMAN, J.—It was with considerable reluctance that I gave my consent to the decision in this cause. Having considered the petition for rehearing and the briefs thereon, I am thoroughly convinced that a rehearing should be granted.

NOTE.—Reported in 115 N. E. 1025, 116 N. E. 861. Wills: time to which words of survivorship refer in devise or bequest of remainder after life estate, 14 Ann. Cas. 706. See under (6) 40 Cyc 1650; (8) 40 Cyc 1645, 1666; (9) 40 Cyc 1675-1681.

MAKEEVER v. MAKEEVER ET AL.

[No. 9,987. Filed November 16, 1917.]

1. **APPEAL—Right of Appeal.—Jurisdiction over Necessary Parties.**—Before an appellate tribunal can proceed to review questions going to the merits of the judgment from which the appeal is prosecuted, it must first appear that such court has jurisdiction of the parties whose rights and interests are affected by the judgment. p. 684.
2. **APPEAL—Death of Defendant after Judgment.—Necessary Parties.—Personal Representative.—Heirs.**—Where defendant in an action to quiet title died after judgment in his favor and before an appeal was perfected, and his widow was appointed executrix of his estate, she was a necessary party to the appeal both in her representative capacity and as an heir. p. 684.
3. **APPEAL—Assignment of Errors.—Amendment.—Time.**—An assignment of error cannot after the time for perfecting an appeal has expired be amended by adding a party, even though the omission is due to appellant's excusable neglect. p. 685.
4. **APPEAL—Parties.—Substitution on Death of Party.—Notice.**—Where parties are substituted as appellees in case of the death of a party after judgment and before appeal, they should have notice either of the application to substitute, or should be served with notice after they have been named as appellees. p. 686.
5. **APPEAL—Parties.—Substitution on Death of Party.—Notice.—Time for Serving.**—Where a party died after judgment and before appeal and no attempt was made to serve substituted appellees with notice of substitution until more than ninety days after the filing of the transcript and the assignment of errors, it was too late. p. 686.

From Newton Circuit Court; *Charles W. Hanley*, Judge.

Action by Francis M. Makeever against Jay Makeever and others. From a judgment for defendants, plaintiff appeals. *Appeal dismissed.*

E. B. Sellers and *John A. Dunlap*, for appellant.

George A. Williams and *W. H. Parkinson*, for appellees.

HOTTEL, C. J.—This is an appeal from a judgment in favor of appellees in an action brought by appellant in which he, in one paragraph of his complaint, sought to quiet title to certain real estate therein described, and in a second and third paragraph he sought to have a trust declared in his favor in the same real estate.

The assignment of error in this court is prefaced with the following statement: "The above named appellant says that Jasper Makeever departed this life about March 15th, 1917, and that Jay Makeever, Charles Makeever, Nellie Makeever, Bride Phillips, Alberta Candice Collins and Jane Makeever are his sole and only heirs at law, and that no administrator or executor has been appointed to administer upon his estate."

Jasper Makeever was a defendant below. His name does not appear in the assignment of error in this court, but there does appear therein as appellees the names of those persons indicated in the preface of such assignment as the heirs of said deceased.

The appellees "other than the heirs of Jasper Makeever, deceased, and Virginia Estella Seward" have filed a motion to dismiss the appeal. The first ground of said motion is as follows: "(1) That no notice of the appeal in said cause has been served upon Jay Makeever." The second, third, fourth, fifth and sixth grounds of said motion are the same as the first except as to the name of the party not served, the name

appearing in said grounds respectively being Charles Makeever, Nellie Makeever, Bride Phillips, Alberta Candice Collins and Jane Makeever. The seventh ground of the motion is as follows: "That Jasper Makeever the defendant in the court below died testate on the 15th day of March, 1917, and by his will appointed his widow Jane Makeever executrix of his estate."

The eighth and ninth grounds are in substance covered by the tenth ground, which is to the following effect, viz.: That the assignment of error herein is defective in that Jasper Makeever, the defendant in the court below, "was dead and his widow, Jane Makeever, was appointed executrix of his estate after the judgment was rendered in the court below and before the transcript and assignment of errors * * * were filed in this court, and said Jane Makeever as said executrix of said estate was not made a party to the assignment of errors."

Causes 13, 14 and 15 are respectively predicated upon the fact that neither Jay Makeever, Charles Makeever nor Nellie Makeever was a defendant below, and that no notice of appeal has been served upon any of them. Said motion contains other grounds, but those indicated are sufficient for the purposes of its disposition.

Since the filing of said motion the appellant, by one of his attorneys, has filed his sworn application to make new parties, which, omitting caption, is in substance as follows: The appellant moves the court for permission to make new parties to this appeal, and shows that the judgment herein was rendered on January 9, 1917; that the transcript was filed on April 7; that Jasper Makeever, one of the defendants below, died on March 15, 1917, at his home in Newton county, Indiana; that this affiant is now and was then a resident of Jasper county, Indiana; that at the time of filing the tran-

script herein affiant believed that the said Jasper Makeever died intestate and he therefore named his legal heirs as parties to this appeal; that he then had no knowledge that said deceased died testate and that an executrix had qualified to administer upon his estate; that the decedent left as his widow one Jane Makeever; that she was named in decedent's will as the executrix thereof, and has since qualified as such; that said Jane Makeever is named in the appellant's assignment of errors as one of the heirs of said deceased; that the children of said deceased are also named, but that the said Jane Makeever as executrix was not a party for the reason that appellant did not know at the time of filing the transcript in this cause that the said Jasper Makeever had died testate and that the said Jane Makeever had been appointed and qualified as executrix. "Wherefore, appellant prays that he be granted permission to make the said Jane Makeever, executrix of the last will and testament of Jasper Makeever, deceased, a party to this appeal, and that appellant be granted permission to give notice to the parties of the appeal."

This application is answered by a counter affidavit of W. H. Parkinson, an attorney for appellees other than Virginia Estella Seward and the heirs of said deceased Jasper Makeever, which, among other things, alleges in substance that Jane Makeever was, on March 21, 1917, appointed executrix of said estate; that she qualified on that day and gave notice by publication in a newspaper of general circulation published in Newton county, Indiana, at or near said date, notifying the public that she was the duly qualified and acting executrix of the said estate of said Jasper Makeever, deceased; that appellant was then and for many years prior thereto, and continuously ever since has been, a resident of said county of Newton; that appellant was a brother of deceased, and lived within one-half mile of his home;

that long before and at the time of the filing of the transcript and assignment of errors in this cause on April 7, 1917, appellant knew, or could with reasonable diligence have known, of the death of Jasper Makeever, and that he died testate and left a will; that affiant verily believes that the said appellant did know prior to April 7, 1917, that said deceased had left a will naming his widow, Jane Makeever, as executrix of his said estate, and that said will had been probated, and that said Jane Makeever was, on April 7, 1917, the duly appointed, qualified and acting executrix of said estate, or was chargeable with knowledge of facts which would have led him to inquire, and upon the slightest inquiry might have known such facts; that the attorney for appellant knew, or could have known by the slightest inquiry, that no notice had ever been served upon the heirs of said deceased, notifying them of said appeal; that neither the appellant nor his attorney ever notified said heirs of Jasper Makeever of said appeal or requested the clerk of the Supreme and Appellate Courts to notify the said heirs as by law required.

The record, so far as pertinent to the question presented, shows the following facts: On March 14, 1916, at the March term of said court, the trial court filed its special finding of facts and conclusions of law in favor of appellees. At the same term, and on April 7, 1916, a motion for new trial was filed and overruled, an appeal prayed by appellant, appeal granted, bond with penalty of \$200 ordered filed, but no security was named or approved. On May 6, in vacation, a bond in sum of \$500, with National Security Company as surety was filed. A vacation entry of July 24, 1916, shows the filing of the longhand manuscript of the evidence. A record entry of January 9, 1917, being the second day of the January term, 1917, of said court, shows that appellant appeared and filed a written motion in said

cause, in which he set out the fact that the court had at the time above indicated filed its special finding of facts and conclusions of law in said cause; that appellant filed a motion for new trial which had been overruled, etc., but that no judgment had been rendered in said cause; that appellant perfected his appeal to the Appellate Court and discovered that no judgment had been rendered in said cause, whereupon he dismissed his appeal and was permitted to withdraw the transcript so filed in the Appellate Court.

In said motion appellant asked the trial court that the case be redocketed and judgment rendered therein. This motion was by the court sustained and judgment rendered in accordance with the finding of facts and conclusions of law, and from such judgment an appeal was prayed by appellant, which was granted by the court upon the filing of a bond in the sum of \$200 within thirty days with Bovee Makeever as surety thereon, which bond and surety were approved by the court, and appellant was given 120 days within which to prepare and file his bill of exceptions. On February 7, in vacation, and within the time last given, the appellant filed his bond in the sum of \$500 with the surety named.

At the following March term, viz., on April 2, 1917, is a record entry showing the filing of a bill of exceptions containing the longhand manuscript of the evidence. The stenographer's certificate to said manuscript bears date July 20, 1916. A later certificate of such reporter bears date April 2, 1917. The record shows two certificates of the judge of the trial court attesting the correctness of the bill of exceptions, one of the date July 22, 1916, showing that the transcript of the evidence and proceedings had been presented to him on that day, and a second bearing date April 2, 1917, showing that such transcript of the evidence had been presented to him on that day.

There are likewise two certificates of the clerk, bearing different dates, and two praecipes for transcript, bearing different dates.

The transcript and assignment of error in this court were filed April 7, 1917. The motion to dismiss the appeal was filed August 10, 1917, and appellant's petition to make new party and to serve notice was filed August 31, 1917.

It will be observed that there is some apparent confusion and conflict in the record entries, dates, etc., but without determining whether said irregularities are of an influential character as affecting said motion to dismiss the appeal, we shall give appellant the benefit of the assumption that they all can be and should be treated as explained by the fact that it is, at least inferentially, disclosed by the record that there was a former appeal and a withdrawal of the transcript filed therein, to be used for the present appeal, that the transcript filed in the present appeal is the same as that filed with the first appeal, and contains original entries and certificates of the reporter, clerk and judge, and also the additional certificates of said officials made necessary by the second appeal perfected after appellant procured the rendition of the judgment herein as above set out.

Said assumption, however, is of no avail against the motion to dismiss. It appears from appellant's assignment of errors, and from the affidavits of the parties filed herein and above set out, that since the rendition of the judgment below, and before the filing in this court of the transcript of the present appeal, one of the defendants below died, leaving as his heirs at law the persons substituted for him in the caption of the assignment of errors.

It also appears from said affidavits of the parties that the widow of said deceased, Jane Makeever, was named as executrix of his will, and that she qualified as such

and was acting in that capacity when the transcript was filed herein. Said widow and children of deceased are named as appellees in the assignment of error, but the widow, Jane Makeever, in her representative capacity as executrix is not so named.

It is fundamental that before an appellate tribunal can proceed to review questions going to the merits of the judgment from which the appeal is prose-

1. cuted, it must first appear that such court has jurisdiction of the parties whose rights and interests are affected by such judgment. *Whisler v. Whisler* (1903), 162 Ind. 136, 144, 67 N. E. 984, 70 N. E. 152; *Michigan Mut. Life Ins. Co. v. Frankel* (1898), 151 Ind. 534, 50 N. E. 304; *Abshire v. Williamson* (1897), 149 Ind. 248, 48 N. E. 1027; *Vordermark v. Wilkinson* (1895), 142 Ind. 142, 39 N. E. 441; *Gates v. Weyenberg* (1915), 60 Ind. App. 241, 110 N. E. 227; *Continental Ins. Co. v. Gue* (1912), 51 Ind. App. 232, 98 N. E. 147.

There can be no doubt but that upon the death of Jasper Makeever his widow and children named in the caption of the assignment of errors as appellees

2. were interested in the judgment appealed from, and hence were properly so named, but we think for the same reason that Jane Makeever in her representative capacity as executrix was likewise a necessary party to the appeal. As such executrix, in the course of her administration of said estate, it might become necessary for her to sell the real estate involved, to pay the debts of said deceased, and hence she, as well as the heirs of deceased, was interested in maintaining said judgment and for this reason was a necessary party to the appeal. *Benoit, Admr., v. Schneider, Admr.* (1872), 39 Ind. 591.

As before stated, appellant, when he filed his assignment of error, recognized the necessity for making the

heirs of deceased parties to said appeal, and now, 3. by his application to make Jane Makeever a party, in her representative capacity, he, by implication at least, recognizes that she also is a necessary party. Said application, however, comes more than 180 days after the final judgment was rendered, and hence is too late unless appellant has shown that his failure to perfect his appeal by a proper assignment of error is due to something other than his own neglect. *Nordyke & Marmon Co. v. Fitzpatrick* (1903), 162 Ind. 663, 666, 71 N. E. 46; *Bacon, Admr., v. Withrow* (1887), 100 Ind. 94, 10 N. E. 624; *Lawrence v. Wood* (1890), 122 Ind. 452, 24 N. E. 159; *Smythe v. Boswell* (1888), 117 Ind. 365, 20 N. E. 263; *Thompson v. Newsom* (1912), 52 Ind. App. 444, 100 N. E. 772.

These cases were decided before the amendment of 1913, limiting the time for taking the appeal to 180 days after the final judgment, but when read in the light of said amendment require that the assignment of error must be perfected within 180 days from the date of the final judgment, or the overruling of the motion for new trial, where such motion is made after the rendition of the judgment. *Rook v. Strauss Bros. Co.* (1914), 58 Ind. App. 82, 107 N. E. 692; *Steel v. Yoder* (1914), 58 Ind. App. 633, 108 N. E. 78

In view of the statute and the decisions *supra*, it is manifest that even if it be conceded that appellant has shown excusable neglect for his failure to make said executrix a party to the appeal (a thing we do not decide), that part of his application *supra* which now seeks to amend his assignment of error by making her a party must be denied, and a dismissal of his appeal must then follow.

It will be observed also that appellant has never made any effort to serve any notice upon the heirs of said deceased so named in his assignment of error as

above indicated. The right and method of substitution of parties in cases where death occurs after the judgment of the trial court is rendered, and before appeal, is provided by §677 Burns 1914, §636 R. S. 1881.

In cases like the present, involving a term-time appeal, there seems to be some confusion and conflict in the decided cases as to the court in which the

4. substitution or application therefor should be made. (*Bruiletts Creek Coal Co. v. Pomatto* [1909], 172 Ind. 288, 294, 88 N. E. 606; *Helms v. Cook* [1914], 58 Ind. App. 259, 108 N. E. 147, and cases there cited); but, wherever made, it would seem that the parties so substituted should have notice either of the application to substitute, or should be served with notice after they had been named as appellees. In the instant case the deceased appellee was not named in the assignment of error as an appellee, as was done in the case of *Bruiletts Creek Coal Co. v. Pomatto, supra*; but the persons named in the preface of such assignment of errors as the heirs of said deceased were substituted and named as appellees. No notice of any kind was served on the substituted appellees notifying them either of an intent or ap-

5. plication to substitute, nor were they served with any notice as appellees after such substitution, and no effort or attempt to so serve them was made until the application above set out was filed, and it was filed more than ninety days after the filing of the transcript and the assignment of errors, and hence is too late. *Steel v. Yoder, supra*; *Helms v. Cook, supra*; *Thompson v. Newsom, supra*.

For the reasons indicated, the appeal must be and is dismissed.

NOTE.—Reported in 117 N. E. 691.

BUCYRUS COMPANY v. TOWNSEND ET AL.

[No. 10,033. Filed November 16, 1917.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Assignment of Error.—Questions Presented.*—On an appeal from an award by the Industrial Board, an assignment of error that the award is contrary to law is sufficient to present both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts. p. 688.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Award.—Necessary Showing.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, for the death of a servant, it must be made to appear that decedent received a personal injury by accident arising out of and in the course of his employment, and that the death of the employe resulted from the injury, before the Industrial Board can allow compensation to a defendant. p. 690.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Evidence.—Sufficiency.*—In a proceeding by dependents for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, for the death of a servant, evidence that decedent, while engaged at his employment, slipped and fell in such a manner as to strike his breast against an iron rod on the machine he was operating, that after the accident he was confined to his bed suffering from pain in his left side and breathing with difficulty, that prior to the accident decedent had been in good health and had not complained of any ailment of the heart or lungs, and testimony by the attending physician that the fall brought on a condition of the heart known as pericarditis which resulted in death, is sufficient to show an injury by accident arising out of and in the course of decedent's employment, and that it proximately caused his death. p. 690.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Cause of Death.—Proof.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, for the death of a servant, claimants were not required to present such proof as would entirely exclude the possibility that decedent's death was due in part to a diseased condition of his heart. p. 690.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Daisy Townsend and others

against the Bucyrus Company. From an award for applicant, the defendant appeals. *Affirmed.*

Phelps F. Darby, for appellant.

Elmer Q. Lockyear, for appellees.

IBACH, P. J.—Appellees' husband and father was an employe of appellant company, and while so employed it is claimed he received a serious personal injury by accident arising out of and in the course of his employment, from which he died on August 8, 1916. On February 3, 1917, appellees, as dependents of decedent, filed their verified application before the Industrial Board for an adjustment of their claim for compensation, which was granted, and they were awarded \$7.29 per week for 300 weeks.

It is contended by appellant that the award of the full board is not sustained by sufficient evidence and is contrary to law. The latter assignment pre-

1. sents both questions. *Union Sanitary Mfg. Co. v. Davis* (1916), 64 Ind. App. 227, 115 N. E. 676, 677.

The facts appearing from the finding are that on August 1, 1916, decedent was in the employ of appellant at an average weekly wage of \$13.26. On that date he received a personal injury by an accident arising out of and in the course of his employment, which resulted in his death August 8, 1916; that the appellant had actual knowledge of his injury at the time it occurred, and that it rendered first aid at the time of his injury and on the second day thereafter furnished an attending physician who attended him at the hospital until his death. He left surviving him Daisy Townsend, his wife, and the other named appellees, his children. Decedent and his wife and children were at the time of his injury and death living together as one family. Two sons, Elma and Alvis, were working and

earning wages, and the wife and the other children being wholly dependent upon decedent for their support.

It appears from the record that the decedent had been in the employ of appellant for several weeks prior to August 1, 1916, on what is termed a "band press," a machine used to press a copper band around shells and the shells were shrapnel shells about eight inches in diameter and two and one-half feet long. The band press is about three and one-half feet high. On the floor there was an iron T-rail extending about an inch above the level of the floor. The decedent took a shell and started to the press. His foot slipped on the T-rail as he was about to lay the shell down, and he fell and hit his breast against the lever that operated the press. This lever consisted of an iron rod about an inch in diameter with a steel handle, and was used for starting and stopping the machine. Decedent was taken to his home that night and immediately went to bed complaining of pain in his left side and had trouble in breathing. Two days later he was taken to the hospital under the care of a physician. After the injury there was found a mark over his heart about five inches long. The only sickness he ever had was about a year before, and that sickness lasted about two weeks. He had been at work almost continuously, and always worked at general labor, and had never complained of anything being wrong with his heart or lungs. The attending physician testified that he found him immediately following the accident, suffering from pain in the left side of the chest in the region of the heart, his breathing was bad, jerking whenever he took a long breath, his heart was laboring, and there was an abnormal sound of the heart; also, that a blow over the heart would cause acute heart disease and, in this case, the fall brought on a condi-

tion of the heart known as "pericarditis," and that killed decedent.

In all cases such as the present, before the Industrial Board can allow compensation to a claimant, it must be made to appear that the decedent received a per-

2. sonal injury by accident arising out of and in the course of his employment, and that the death of the employe resulted from such injury.

It is insisted here that decedent did not die as a result of the accidental injury, but that his death was due to a disease, neither produced nor aggravated

3. by such injury. While the evidence might permit of a result different from that reached by the Industrial Board, yet we are satisfied that the uncontradicted testimony of the son, the only person who saw the accident, and the testimony of the physician who treated decedent from the date of his injury, who we must assume was a competent physician, together with all the other facts and circumstances shown by the evidence, was sufficient to show an injury by accident arising out of and in the course of decedent's employment, and that such injury proximately caused his death. *Columbia School Supply Co. v. Lewis* (1917), ante, 116 N. E. 1; *Habbe v. Viele* (1897), 148 Ind. 116, 45 N. E. 783, 47 N. E. 1; *Bayne v. Riverside Storage, etc., Co.* (1914), 181 Mich. 378; 148 N. W. 412, 5 N. C. C. A. 857. The dependents were

4. not required to present such proof as would entirely exclude the possibility that decedent's death was due in part to a diseased condition of his heart.

We think the determination of the board should be sustained. Award affirmed.

NOTE.—Reported in 117 N. E. 656. Workmen's compensation: what is an accident arising out of and in the course of employment within meaning of act, Ann. Cas. 1913C 4, 1914B 498, 1916B 1293, 1918B 768.

MOORE v. OHL.

[No. 9,257. Filed May 8, 1917. Rehearing denied November 16, 1917.]

1. **APPEAL.—Briefs.—Sufficiency.**—The rules of the Supreme and Appellate Courts relating to the preparation of briefs are not complied with by a mere statement in appellant's points and authorities of general propositions of law which neither by wording nor direct reference are applied to any particular ruling of the trial court relied on for reversal. p. 693.
2. **CONTRACTS.—Parol Contracts.—Parol Evidence.**—A contract partly in writing and partly in parol becomes a mere verbal contract, and, where it is necessary to resort to oral evidence to establish the terms of a contract, then the whole contract is regarded as being verbal. p. 695.
3. **APPEAL.—Review.—Harmless Error.—Instructions.**—Although a contract to furnish board and lodging was in writing, except that the method of ascertaining the amount of compensation required oral evidence, and was, technically, an oral contract, yet an instruction in an action on a note that defendant, who pleaded such contract by way of set-off and alleged it to be written, had the burden of proving that the contract was written was not prejudicial to her, where the evidence showed only that the contract was written and the instruction expressly authorized a recovery for the value of the service shown by the evidence independent of the contract. p. 696.
4. **APPEAL.—Review.—Verdict.—Excessive Recovery.**—Where, in an action on two notes, one for \$700 and the other for \$500, defendant counterclaimed for maintenance and support furnished plaintiff, and plaintiff's recovery was for less than the amount due on the \$700 note, the court on appeal cannot sustain defendant's contention that, because the undisputed evidence showed that the value of her services was approximately \$1,600, the jury must have found for her on her counterclaim and that the recovery was too large, since the jury may have found against defendant's counterclaim and against plaintiff on the \$500 note, in which case the verdict was too small. p. 698.
5. **APPEAL.—Briefs.—Sufficiency.**—Alleged error in the refusal of instructions is not presented for review, where appellant's points and authorities do not refer to the instructions or to any error predicated on their refusal. p. 699.
6. **APPEAL.—Briefs.—Argument.**—An argument is not a necessary part of a brief, and any question attempted to be presented thereby will not be considered where not presented in appellant's points and authorities. p. 699.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by Sarah C. Ohl against Laurinda Moore. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

James V. Kent and *Thomas M. Ryan*, for appellant.

Albert J. Bayne, *John W. Strawn* and *William Robison*, for appellee.

HOTTEL, J.—Appellee filed in the Clinton Circuit Court a complaint in two paragraphs. The first paragraph was based on a promissory note for \$700, executed by appellant on May 9, 1902, due five years after date, and bearing five per cent. interest from date. The second paragraph was based on a note for \$500, executed May 23, 1899, due one year after date, and bearing six per cent. interest from date, with a credit of \$10 endorsed thereon, of date June 23, 1900, "to be applied on interest," such paragraph containing an averment that a payment of five dollars was made on said note December 26, 1913.

The appellant filed an answer in six paragraphs, viz.: (1) A general denial; (2) the ten-year statute of limitation, addressed to the second paragraph of complaint alone; (3) payment of each note; (4) that each note was executed without any consideration; (5) the fifth paragraph was by way of set-off, the averments of which, material to the questions presented, are hereinafter indicated; (6) the sixth paragraph is addressed to the first paragraph of complaint and sets out in detail the circumstances under which the \$700 note was executed, its theory being that such note was executed without any consideration.

A reply in general denial was filed to the affirmative paragraphs of answer. A trial by jury resulted in a verdict for appellee in the sum of \$800.

Appellant filed a motion for new trial, which was

overruled, and this ruling is assigned as error and relied on for a reversal. Said motion contains numer-

1. ous grounds, but in her brief, appellant, under the heading "Propositions and Authorities" has merely stated general propositions of law without applying any of them, except as hereinafter indicated, to either of the grounds of said motion. Under the construction and interpretation of the rules of the Supreme Court and this court, as frequently announced by both courts, such rules are not complied with by a mere statement in appellant's points and authorities of general propositions of law which neither by their wording nor by any direct reference are applied to any particular ruling of the trial court relied on for reversal. *Inland Steel Co. v. Smith* (1906), 168 Ind. 245, 252, 80 N. E. 538; *Pittsburgh, etc., R. Co. v. Lightheiser* (1906), 168 Ind. 438, 78 N. E. 1033; *Michael v. State* (1912), 178 Ind. 676, 99 N. E. 788; *Husak v. Clifford* (1912), 179 Ind. 173, 100 N. E. 466; *Leach v. State* (1911), 177 Ind. 234, 240, 97 N. E. 792; *German Fire Ins. Co. v. Zonker* (1914), 57 Ind. App. 696, 702, 703, 108 N. E. 160; *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 103 N. E. 652.

We shall therefore limit our consideration of the grounds of appellant's motion for new trial to such as are presented by her brief within the rule of the court as interpreted by the cases cited.

The first four propositions submitted by appellant, while not specifically directed to any ruling of the trial court relied on for reversal, furnish the foundation for her fifth proposition, which challenges the action of the trial court in giving the ninth instruction. These propositions, when considered together, are to the following effect, viz.: It is insisted that the averments of the fifth paragraph of answer show that the contract between appellant and appellee set out in such answer

and relied on as the basis of appellant's set-off was part in writing and part in parol, and hence that the entire contract should be treated as oral. Appellant then says that it follows as a sequence that the court erred in giving the ninth instruction.

This instruction is as follows: "No. 9. The defendant in this cause pleads a written contract under which it is claimed the defendant furnished the plaintiff certain board, lodging, care and support. I instruct you that under said allegations the burden is on the defendant to prove that there was a *written* contract under which the said services, if any, were rendered by the defendant to the plaintiff. If you find that the defendant has proven by a preponderance of the evidence that such a contract was executed and that defendant did, under said contract, perform the services for plaintiff as alleged, and that the evidence shows the value thereof, then you should find for the defendant on that proposition."

As affecting the question under consideration, the fifth paragraph of answer contains the following averments: "At the time said note was executed the plaintiff and the defendant entered into a *written* contract by which it was agreed that the plaintiff should live with this defendant in her home, * * * and * * * should pay to this defendant, during the time that she might so live with her, under the terms of said contract, the customary price for boarding and lodging of persons like situate in said neighborhood. * * * Said contract has been lost or destroyed and * * * defendant has been unable to find the same after diligent search therefor in such places as she believed the same likely to be found. (Our italics.)

"In pursuance to * * * said contract * * * plaintiff, * * * defendant's mother, came and lived with * * * defendant for a period of one year after

the execution of said contract and then left the home of * * * defendant and remained away until November, of the year 1901, at which time * * * plaintiff, under and pursuant to the terms of * * * said contract, returned to the home of * * * defendant and * * * continued to reside with * * * defendant and did reside and live with her, from and after said month of November, 1901, until September of the year 1913, at which time plaintiff left * * *.

"During all said time * * * defendant boarded and lodged plaintiff, provided her with two rooms of her dwelling house for her own separate use and during said time bought and furnished clothes of the value of \$50.00 per year, at the special instance and request of * * * plaintiff, provided her with money to provide for her * * * wants in the amount of \$40.00 per year during all of said time, which * * * money was loaned to plaintiff at her special instance and request. * * * The board and lodging so provided by * * * defendant for * * * plaintiff during all of said time was of the reasonable value of \$4.00 per week, * * * \$4.50 per week was the customary price in said neighborhood during said time for the furnishing of board and lodging of the kind furnished by defendant to plaintiff during said time."

It is true, as appellant contends, that: "A contract partly in writing and partly in parol becomes a mere verbal contract. Where it is necessary to resort

2. to oral evidence to establish terms of the contract, then the whole contract is regarded as a verbal one." *Tomlinson v. Briles* (1885), 101 Ind. 538, 1 N. E. 63; *Higham v. Harris* (1887), 108 Ind. 246, 8 N. E. 255; *Gordon v. Gordon* (1884), 96 Ind. 134; *Hackleman v. Board, etc.* (1884), 94 Ind. 36; *High v. Board, etc.* (1884), 92 Ind. 580; *McCurdy v. Bowes* (1883), 88 Ind. 583; *Board, etc. v. Miller* (1882), 87

Ind. 257; *Pulse v. Miller* (1881), 81 Ind. 190; *Board, etc. v. Shipley* (1881), 77 Ind. 553.

Assuming, without deciding, that the averments of said answer bring it within the application of the rule announced in the cases cited, and that, strictly

3. and technically speaking, the contract relied on in said answer is, in law, treated as a verbal contract, the fact remains that both the answer and the undisputed evidence show that such contract, if in fact any was made, was in writing, but that one of its provisions, viz., that providing the method by which the amount of appellant's compensation for the care, etc., furnished thereunder, required proof outside of the contract. Whatever influence such provision may have had upon the legal effect of such contract, it did not change the actual facts, and we are unable to see wherein appellant could have been harmed by, or that she is in any position to complain of, that part of the instruction which placed on her the burden of proving that "there was a *written* contract under which the said services, if any, were rendered by the defendant to the plaintiff," especially in view of the averments of her answer, and in view of the fact that her own testimony, as well as the other evidence offered by her, showed a written contract under which such services were rendered. The instruction does not require proof of a written contract as to the value of said service, but, on the contrary, expressly authorizes recovery for the value of such service shown by the evidence independent of the contract, and hence gives appellant the full benefit of the contract as it was set up in her answer. The jury could not have been misled to appellant's injury by said instruction, and hence no reversible error resulted from the giving of it.

Appellant's remaining propositions, stated in her own language, are as follows: (6) "Where one claim is

barred by the Statute of Limitations and another is not, the creditor may apply an undirected payment to the one so barred and may sue on the other." *Mills v. Fowkes* (1839), 5 Bing. N. C. 455; *Armistead v. Brooke* (1857), 18 Ark. 521. (7) "But such payment is not effectual to revive the remedy as to the residue of the note remaining unpaid and take the same out of the Statute of Limitations." *Mills v. Fowkes, supra*; *Armistead v. Brooke, supra*; *Pond v. Williams* (1854), 1 Gray (Mass.) 630; *Livermore v. Rand* (1852), 26 N. H. 85. (8) "The debtor is not presumed to have intended to revive a promise which is no longer legally binding on him, although he has put it in his creditor's power to satisfy *pro tanto* a claim upon which he has lost his legal remedy. *Ramsay v. Warner* (1867), 97 Mass. 8; *Ayer v. Hawkins* (1846), 19 Vt. 26; *Wheeler v. House* (1855), 27 Vt. 735; *Pierce, etc., Co. v. Knight* (1859), 31 Vt. 701. (9) "If the debtor does not direct and the creditor does not make an application of the payment then the court will not make the application to a claim barred by the Statute of Limitations, for the application will be made by the court only to extinguish those debts or claims that are legally enforceable." 2 Am. and Eng. Ency. Law 458; *Livermore v. Rand, supra*. (10) "The Five Hundred Dollar Note counted on in the second paragraph of the complaint was barred by the Statute of Limitations." §295, cl. 5, Burns 1914, §293 R. S. 1881. (11) "The courts will not take cognizance of cross claims between litigants and set one off against the other. The court proceeds upon the principle that one demand is *pro tanto* a satisfaction of the other, and that the real indebtedness is merely the balance." *Porter v. Roseman* (1905), 165 Ind. 255, 74 N. E. 1105, 112 Am. St. 222, 6 Ann. Cas. 718. (12) "The Clinton Circuit Court erred in overruling appellant's motion for a new trial." (13)

"The jury erred in the assessment of damages the same being too large." As affecting the question of the effect of an undirected payment upon the tolling of the statute of limitations, see, also, *Barrett v. Sipp* (1911), 50 Ind. App. 304, 98 N. E. 310, and cases there cited.

It will be observed that appellant makes no application of either of the legal propositions, *supra*, to any ruling of the trial court assigned as a ground of

4. her motion for new trial, and no reference is made to any such ruling except that contained in the last proposition. However, inasmuch as the second ground of appellant's motion for new trial charges "error in the assessment of the amount of the recovery, the same being too large," we think it but fair to her to assume in favor of her brief that her general propositions of law indicated *supra* were intended to furnish the basis for her contention involved in her propositions Nos. 12 and 13, viz.: that the motion for new trial should have been sustained on account of error in the assessment of the amount of the recovery. We have therefore carefully read the evidence to see whether it necessitates such a conclusion. If appellant's contention relative to the question involved rested solely on the evidence given in support of the \$5 payment alleged in the second paragraph of complaint and relied on by appellee for tolling the statute of limitations as to the \$500 note, her legal propositions, *supra*, might be of controlling influence, but such contention involves the further assumption that the jury found for her on her fifth paragraph of answer setting up said contract for support and maintenance entered into between her and appellee. Appellant insists in effect that the latter conclusion is necessitated because the amount of the recovery is less than the amount due on the \$700 note. It is argued that the undisputed evidence shows that appellee was cared for by appellant for not less

than eight years and that the value of such care and keep was not less than \$208 a year, and hence, that the jury must have found for her on said fifth paragraph of answer, and either treated the \$500 note as not barred by the statute of limitations, or otherwise arbitrarily refused to allow her the amount shown by the undisputed evidence to have been the value of the maintenance and support furnished by her. The trouble with this contention is that this court cannot know or say how the jury arrived at the amount of the verdict returned. The instructions given in the case authorized a finding by the jury that the \$500 note was barred by the statute of limitations, and, so far as this court knows, it may have so found, and it may have also found against appellant on her fifth paragraph of answer, in which case the assessment of recovery was too small, and of this appellant could not complain.

In her argument, appellant challenges the action of the trial court in refusing to give instructions Nos. 4 and 8 tendered by her. These instructions re-

5. late to appellant's answer of the statute of limitations, the latter being a peremptory instruction, directing a verdict for appellant on the second paragraph of the complaint, but as no reference is made in appellant's points and authorities to either of said instructions, or to any error predicated on the court's refusal to give either of them, the action of the trial court in refusing to give them is not presented for review. An argument, under the rules of the

6. court, is not a necessary part of a brief, and, in so far as it attempts to present any question not presented in appellant's points and authorities, it will not be considered. *Pittsburgh, etc., R. Co. v. Greb* (1904, 34 Ind. App. 625, 73 N. E. 620; *Wolf v. Akin*

(1913), 55 Ind. App. 589, 590, 591, 104 N. E. 308, and cases there cited.

Finding no reversible error in the record, the judgment below is affirmed.

NOTE.—Reported in 116 N. E. 9.

GARDNER v. BENSON.

[No. 9,897. Filed November 20, 1917.]

APPEAL.—Assignment of Errors.—Parties.—Defective Assignment.—Dismissal.—Where plaintiff sued in his capacity as trustee and recovered judgment, and by the assignment of errors was made a party on defendant's appeal in his individual capacity, the transcript being filed before the act of 1917, Acts 1917 p. 523, concerning civil procedure became effective, the appeal will be dismissed on motion filed after the expiration of time for perfecting the appeal.

From Marion Circuit Court (25,672); *Louis B. Ewbank*, Judge.

Action by Adelbert S. Benson, trustee, against Charles J. Gardner. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

Means & Buening, for appellant.

Bingham & Bingham and *A. G. Cavins*, for appellee.

DAUSMAN, J.—Appellee, Adelbert S. Benson, in his capacity as trustee for a number of interested persons, instituted this action against appellant, Charles J. Gardner, to recover damages for breach of contract. Judgment against Gardner and in favor of Adelbert S. Benson, trustee. By the assignment of error Adelbert S. Benson was made a party on appeal in his individual capacity, and not in his capacity as trustee. The transcript was filed March 3, 1917, before the act entitled "An Act Concerning Civil Procedure," Acts 1917 p. 523, became effective; and that fact alone is a sufficient reason for holding that §3 of said act does not apply to

Mitten v. Delano—65 Ind. App. 701.

this case. Appellee filed a motion to dismiss on July 18, 1917, at which time more than 180 days had elapsed since the rendition of the judgment and the overruling of the motion for a new trial.

Under the ruling of the Supreme Court in *Milburn v. Cory* (1915), 184 Ind. 341, 110 N. E. 193, the motion to dismiss must be sustained.

Appeal dismissed.

NOTE.—Reported in 117 N. E. 655.

FLICK v. FLICK.

[No. 10,017. Filed June 29, 1917.]

From Howard Circuit Court; *William C. Overton*, Judge.

Action between Emma Flick and John W. Flick. From the judgment rendered, the former appeals. *Reversed*.

Barnabas C. Maon, for appellant.

Overson & Manning, for appellee.

PER CURIAM.—Upon the confession of errors filed by appellee June 28, 1917, the judgment below is reversed, with instructions to the trial court to sustain appellant's motion for new trial.

MITTEN v. DELANO ET AL., RECEIVERS.

[No. 9,265. Filed June 29, 1917.]

From Marion Superior Court (92,817); *V. G. Clifford*, Judge.

Action by Edward LeRoy Mitten against Frederic A. Delano and others, receivers. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

J. Fred Masters, A. D. Babcock, James E. Babcock and William H. Parkinson, for appellant.

Edwin P. Hammond, William V. Stuart, Charles H. Stuart and Allison E. Stuart, for appellees.

HOTTEL, C. J.—This is an appeal from a judgment in appellees' favor in an action brought by appellant to recover for personal injuries received by him while being carried on one of appel-

lees' trains, it being alleged that such injuries were caused by appellees' negligence.

Appellant when injured was riding on a pass which contained a release from a liability for injuries substantially the same as the release in the pass involved in the case of *Ft. Wayne, etc., Traction Co. v. Justus* (1917), 186 Ind. 464, 115 N. E. 585.

In that case the Supreme Court held that the pass there involved was "free," and that the stipulation by which the decedent assumed the risk of damages for injury to himself and property was binding, and that "no recovery could be had for causing his death unless done wilfully." The facts and circumstances connected with the issuing of the passes in the two cases are not materially different, nor are there any other facts in the instant case upon which it could be distinguished from the case cited.

Upon the authority of that case, the judgment below must be, and is, affirmed.

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[NOTE.—The citation *Ingram v. Jeffersonville, etc., Transit Co.*, 532, 537 (2) indicates that the opinion begins on page 532, that the point cited is on page 537, and that the point is numbered (2) in the margin.—RABONRA.]

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See INSURANCE.

ACCOMMODATION—

Surety, test, see PRINCIPAL AND SURETY.

ACKNOWLEDGMENT—

Deeds.—Sufficiency.—Certificate of Foreign Notary.—A deed executed in another state conveying land in this state acknowledged by each of the grantors before a notary public with indications that a seal was attached and that the acknowledgments of the grantors' wives were taken out of the hearing and presence of their husbands sufficiently complied with §§476, 3965, 3982 Burns 1914, §§460, 2933, 2947 R. S. 1881, as to notary's certificates and acknowledgment of instruments, to entitle the instrument to be recorded, and such deed was admissible in evidence as against the objection that it was not properly acknowledged.

Ingram v. Jeffersonville, etc., Transit Co., 532, 537 (2).

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Benedict v. Bushnell, 365, 368 (1).

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APPEAL.

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I. DECISIONS REVIEWABLE.

1. *Right to Appeal.—Final Judgment.—Statute.*—Under §324 Burns 1914, §320 R. S. 1881, providing that in an action against defendants severally liable, plaintiff may proceed against those served, and afterwards proceed against those not served, where, in an action against two defendants, principal and surety, service was obtained, only on the surety, judgment entered on the sustaining of the surety's demurrer to the complaint, and plaintiff's refusal to plead further was a final judgment from which an appeal will lie, though the case was continued as to the defendant not served, since the judgment rendered adjudicates all the issues presented by the pleadings as to all the parties actually before the court.

Lake Mich. Water Co. v. U.S. Fidelity, etc., Co., 141, 145 (2).

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II. RESERVATION IN TRIAL COURT OF GROUNDS OF REVIEW.

See also MASTER AND SERVANT 83.

2. *Questions Reviewable.—Ruling on Demurrer.—Statute.*—Since the enactment of §348 Burns 1914, Acts 1911 p. 415, an assignment of error that the complaint does not state facts sufficient to constitute a cause of action presents no question for review.
Aufderheide, Trustee, v. Heward, 286, 288 (2).
3. *Review.—Assignment of Errors.—Insufficiency of Complaint.—Statute.*—Since the enactment of §348 Burns 1914, Acts 1911 p. 415, the sufficiency of a complaint for want of facts cannot be assailed for the first time by assignment of error on appeal.
Riley v. First Trust Co., Admr., 577, 578 (1).
4. *Exceptions.—When Taken.—Statute.—Scope and Application.*—Section 656 Burns 1914, §626 R. S. 1881, providing that a party objecting to any decision of the court must except at the time the decision is made, did not require defendant to except at the time to an order restoring to the docket an action dismissed at a previous term for want of prosecution, where the order was made on the verbal motion of plaintiff, without notice to or appearance by defendant, since the court did not have jurisdiction over his person, so that the ruling on the motion to redocket was not binding on him.
Johnson v. First Nat. Bank, etc., 629, 633 (2).

III. PARTIES.

See also 18.

5. *Improper Designation.—Statute.*—Under §1 of the act of 1917, Acts 1917 p. 523, providing that parties named in an appeal shall be properly before the court for all purposes, whether they are named as appellants, or appellees, and that the improper designation of parties shall not affect the jurisdiction of the court, the Appellate Court would be required, if it had jurisdiction in an appeal, to set aside an order of dismissal, made because a party appellee had been named as an appellant, and decide the case on its merits.
Nation v. Green, 136, 140 (5).
6. *Right of Appeal.—Jurisdiction over Necessary Parties.*—Before an appellate tribunal can proceed to review questions going to the merits of the judgment from which the appeal is prosecuted, it must first appear that such court has jurisdiction of the parties whose rights and interests are affected by the judgment.
Makeever v. Makeever, 677, 684 (1).
7. *Death of Defendant after Judgment.—Necessary Parties.—Personal Representative.—Heirs.*—Where defendant in an action to quiet title died after judgment in his favor and before an appeal was perfected, and his widow was appointed executrix of his estate, she was a necessary party to the appeal both in her representative capacity and as an heir.
Makeever v. Makeever, 677, 684 (2).
8. *Substitution on Death of Party.—Notice.*—Where parties are substituted as appellees in case of the death of a party after judgment and before appeal, they should have notice either of

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the application to substitute, or should be served with notice after they have been named as appellees.

Makeever v. Makeever, 677, 686 (4).

9. *Substitution on Death of Party.—Notice.—Time for Serving.*—Where a party died after judgment and before appeal and no attempt was made to serve substituted appellees with notice of substitution until more than ninety days after the filing of the transcript and the assignment of errors, it was too late.

Makeever v. Makeever, 677, 686 (5).

10. *Vacation Appeal by One of Several Codefendants.—Notice.—Statute.*—Under §675 Burns 1914, Acts 1895 p. 179, providing that whenever a party, or any number of coparties against whom a judgment has been taken, shall appeal under §638 R. S. 1881, providing for term-time appeals, it shall not be necessary to make coparties parties to the appeal, but they shall be bound by the judgment on appeal as if made parties, and that, after any such appeal has been perfected, any coparty not joining therein may, while such appeal is pending, and within one year from the date of final judgment, assign errors for himself upon the record, and that he shall have all the rights, in relation to such appeal, that he would have had, had he joined in the appeal originally, a coparty assigning error on the transcript but not perfecting a term-time appeal is not relieved of giving to appellees the notices required to perfect a vacation appeal.

Chicago, etc., R. Co. v. Priddy, 552, 559, 561 (3).

IV. PERFECTION OF APPEAL—REQUISITES.

11. *Extending Time for Appeal.—Motion for New Trial.*—Appellant's motion for a new trial, waived because filed subsequently to their motion in arrest of judgment, did not extend the time for perfecting the appeal.

Treloar v. Harris, 22, 23 (2).

12. *Term-Time Appeal by One of Several Codefendants.—Notice to Appellees.—Rules of Court.*—Where one of several codefendants assigned error on the transcript filed in a term-time appeal by a coparty, but failed to perfect a term-time appeal, and did not serve notice of its appeal on appellees, who had entered no appearance, within ninety days after the filing of the transcript, and no excuse was offered for such failure to observe Rule 36 of the Appellate Court, relating to notices in vacation appeals, the court will not relieve appellant from the enforcement of such rule on the ground that the failure of its observance was due to excusable accident, mistake, or oversight.

Chicago, etc., R. Co. v. Priddy, 552, 557, 558 (1).

V. RECORD—PREPARATION AND CONTENTS.

See also 46, 47, 48, 53.

13. *Presenting Questions for Review.—Objections to Evidence.*—The correctness of rulings on objections to the admission of evidence cannot be determined in the absence of the evidence from the record.

Houk v. Harter, 373, 374 (1).

14. *Questions Reviewable.—Ruling on Motion for New Trial.*—Grounds of a motion for a new trial that the verdict is contrary to law, and that the jury erred in the assessment of the

APPEAL—Continued.

amount of recovery, are not available on appeal where the record contains no bill of exceptions.

Aufderheide, Trustee, v. Heward, 286, 288 (3).

15. *Questions Reviewable.—Conclusions of Law.—Ruling on Motion, for Venire de Novo.*—Where the record discloses no special finding of facts, conclusions of law, or motion for a *venire de novo*, error assigned as to the conclusions of law and in overruling a motion for a *venire de novo* presents no question for review.

Aufderheide, Trustee, v. Heward, 286, 288 (1).

VI. ASSIGNMENT OF ERRORS.

See also 2, 3.

16. *Amendment.—Time.*—An assignment of error cannot after the time for perfecting an appeal has expired be amended by adding a party, even though the omission is due to appellant's excusable neglect.

Makeever v. Makeever, 677, 685 (3).

17. *Grounds.*—An assignment of error that the complaint does not state facts sufficient to constitute a cause of action presents no question for review on appeal.

Peacock Coal, etc., Co. v. Crawford, 401, 403 (1).

18. *Parties.—Defective Assignment.—Dismissal.*—Where plaintiff sued in his capacity as trustee and recovered judgment, and by the assignment of errors was made a party on defendant's appeal in his individual capacity, the transcript being filed before the act of 1917, Acts 1917 p. 523, concerning civil procedure became effective, the appeal will be dismissed on motion filed after the expiration of time for perfecting the appeal.

Gardner v. Benson, 700.

19. *Refusal to Strike out Parts of Deposition.*—An assignment of error predicated on the overruling of a motion to strike out certain parts of a deposition presents no question for review.

Johnson v. Gephart, 322, 326 (4).

VII. BRIEFS.

See also 37, 45, 89, 90.

20. *Argument.*—An argument is not a necessary part of a brief, and any question attempted to be presented thereby will not be considered where not presented in appellant's points and authorities.

Moore v. Ohl, 691, 699 (6).

21. *Sufficiency.*—Alleged error in the refusal of instructions is not presented for review, where appellant's points and authorities do not refer to the instructions or to any error predicated on their refusal.

Moore v. Ohl, 691, 699 (5).

22. *Sufficiency.*—The rules of the Supreme and Appellate Courts relating to the preparation of briefs are not complied with by a mere statement in appellant's points and authorities of general propositions of law which neither by wording nor direct reference are applied to any particular ruling of the trial court relied on for reversal.

Moore v. Ohl, 691, 693 (1).

23. *Sufficiency.*—Where appellant's brief, in its points and authorities, states several general propositions of law without indicating to what particular ground of the motion for new trial it desires to apply them, as required by Rule 22 of the Appellate

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Court, only such of these propositions as by their wording indicate to what particular ground of the motion they were intended to apply will be considered.

Indiana Mfg. Co. v. Coughlin, 268, 283 (11).

24. *Questions Presented*.—Mere abstract propositions of law, stated under points and authorities in appellant's brief, though correct in principle, are not sufficient to present reversible error.

Globe, etc., Ins. Co. v. Hamilton, 541, 549 (10).

25. *Questions Presented*.—*Excessive Damages*.—In an appeal from a judgment for injury to a carload of live stock while in shipment, a contention that an item of damages was doubly assessed is not properly presented by appellant's briefs under the heading "Error in Conclusions of Law," nor is the question presented for review by a ground of the motion for a new trial alleging excessive damages, where such ground is not referred to either in appellant's points and authorities or in its brief under the heading "Error in Overruling Motion for New Trial."

Chicago, etc., R. Co. v. Priddy, 552, 574 (10).

26. *Sufficiency*.—*Specification of Errors*.—Although points in appellant's brief are somewhat general, it is the duty of the court on appeal to give them consideration where there is no difficulty in ascertaining the ruling to which they are directed.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 255 (12).

27. *Sufficiency*.—*Motion to Dismiss*.—Whenever briefs are sufficient under the rules of court to present any question, a motion to dismiss the appeal because of the failure of the brief to comply with the rules will be overruled, and the questions presented determined.

Johnson v. Gephart, 322, 326 (3).

28. *Sufficiency*.—*Rules of Court*.—An appeal will not be dismissed on the ground that appellant's briefs fail to comply with Rule 25 of the Appellate Court, requiring briefs to be printed or typewritten on paper of a specified size, leaving a margin of at least one inch on the left side, where the briefs, except the covers, are printed, although the pages have little or no margins, the briefs so present at least some of the questions attempted to be raised that they can be determined without reference to the record.

Johnson v. Gephart, 322, 326 (2).

29. *Sufficiency*.—*Rules of Court*.—Appellant's brief is sufficient as against a motion to dismiss on the ground that it does not comply with Rule 22 of the Appellate Court by properly giving the page and line of the matter referred to in the record, where the brief purports to indicate the page and line of the transcript where the record set out or referred to will be found, and appellees have not pointed out wherein appellants have failed in this respect.

Johnson v. Gephart, 322, 325 (1).

30. *Sufficiency*.—*Waiver of Error*.—Error in the giving or refusal of instructions is waived where not presented under the points and authorities in appellant's brief.

Indiana Mfg. Co. v. Coughlin, Admr., 268, 286 (14).

31. *Waiver of Error*.—Assignments of error not presented in appellant's briefs are waived.

Globe, etc., Ins. Co. v. Hamilton, 541, 543 (1).

32. *Sufficiency*.—*Waiver of Error*.—An assigned error not mentioned under the points and authorities in appellant's briefs is waived.

Kerr v. State, ex rel., 102, 108 (3).

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33. *Sufficiency.—Waiver of Error.*—Where appellant's briefs set forth a mere abstract proposition of law which is not applied to a question sought to be raised, the question is waived.
Pinkus v. Pittsburgh, etc., R. Co., 38, 41 (1).
34. *Waiver of Error.*—Assignments of error are waived where appellant's brief fails to present any points or propositions relating thereto.
Continental Ins. Co. v. Bair, 502, 507 (1).

VIII. REVIEW.

(A) SCOPE AND EXTENT IN GENERAL.

35. The court on appeal will not search the record to reverse a judgment, though it may do so to affirm.
Globe, etc., Ins. Co. v. Hamilton, 541, 549 (9).
36. *Presenting Questions.—Ruling on Motion for New Trial.—Grounds.*—That the finding of the court is not fairly supported by the evidence, the finding of the court is clearly against the weight of the evidence, the judgment is clearly against the weight of the evidence, and the judgment is contrary to law, are not recognized by the statute as grounds for a new trial, and will not be considered on appeal.
Workman v. Rhodes, 413, 414 (1).
37. *Questions Reviewable.—Briefs.—Sufficiency.*—A mere general statement in appellant's briefs that, where a finding is improperly affected by errors of law at the trial, or where a part of the evidence tending to support the finding upon a material point is legally insufficient, the finding is contrary to law, is, under Rule 22 of the Supreme Court, insufficient to present a question for review.
Kerr v. State, ex rel., 102, 108 (4).
38. *Refusal of Instructions.*—Where plaintiff drove her automobile across a street intersection at a speed of eight miles an hour, while defendant approached the crossing in his car at a speed of forty miles an hour, both drivers violating a statute and a city ordinance regulating the speed of automobiles, and, in attempting to avoid a collision with defendant's car, plaintiff drove her machine into a telegraph pole, it was not error for the court to refuse a requested instruction that plaintiff's violation of the statute and ordinance was negligence, and there could be no recovery if it proximately contributed to the injury, where the jury was warranted in finding that plaintiff was placed in a position of imminent peril by reason of defendant's negligence and reckless driving, since, in such a case, plaintiff was not guilty of negligence, though she violated the speed regulation, if her conduct under the circumstances was that of a person of ordinary prudence.
Mayer v. Mellette, 54, 64 (9).
39. *Ruling on Demurrer.—Scope of Review.*—A ruling of the trial court sustaining a demurrer to a complaint will, if correct, be sustained on appeal, regardless of the correctness of the grounds set forth in the memorandum accompanying the demurrer.
Martin v. Board, etc., 375, 378 (2).
40. *Ruling on Demurrer.*—Where a paragraph of reply, to which a demurrer was overruled, pleaded facts admissible under the general denial, and also invoked the principle of estoppel, and the theory of the court's general finding for plaintiff cannot be ascertained, the court on appeal must determine the sufficiency

APPEAL—Continued.

of the reply on the theory of estoppel before it can say whether the ruling on defendant's demurrer was harmless.

Trinkle v. Ladoga Building, etc., Assn., 415, 423 (5).

41. *Ruling on Demurrer to Answer.—Reversal.*—Where judgment was rendered against plaintiff on his refusal to plead over after the overruling of his demurrers to paragraphs of answer, if any one of such paragraphs is good as against demurrer, it alone is sufficient to support the judgment, and the cause will be affirmed. *Hayward v. Hayward, Admr.*, 440, 448 (2).

42. *Theory of Case.*—The court on appeal will look to the whole record to determine the theory upon which a case was tried and disposed of in the lower court. *Hedges v. Mehring*, 586, 597 (4).

(B) INTERLOCUTORY, COLLATERAL AND SUPPLEMENTARY QUESTIONS.

43. *Presenting Questions for Review.—Ruling on Demurrer.—Motion for New Trial.*—Where the complaint was in a single paragraph, and plaintiff elected to stand thereon after an adverse ruling on demurrer, it was unnecessary for him to move for a new trial, and the ruling on the motion therefor presents no question for review on appeal.

Martin v. Board, etc., 375, 378 (1).

(C) PARTIES ENTITLED TO ALLEGE ERROR.

44. *Invited Error.—Instructions.*—Appellant cannot be heard to complain of an instruction as being outside the evidence, where it tendered an instruction embodying the same legal proposition. *Supreme Lodge, etc. v. Graham*, 220, 224 (2).

45. *Questions Reviewable.—Admission of Evidence.—Briefs.*—Appellants' objection to the admission of evidence is not available on appeal, where their briefs do not refer specifically to any evidence, nor disclose that the objection made on appeal was made at the trial. *Johnson v. Gephart*, 322, 329 (9).

46. *Questions Reviewable.—Objections to Instructions.—Record.*—No question is presented for review as to alleged error in the giving and refusal of instructions where the instructions and any exceptions thereto are not made a part of the record either by a bill of exceptions or by order of the court, and the record does not show that appellant has complied with either §559 Burns 1914, §534 R. S. 1881, providing for the submission of special instructions before argument, or §561 Burns 1914, Acts 1907 p. 652, relating to the practice in giving instructions and saving exceptions to the giving and refusal thereof.

Houk v. Harter, 373, 375 (3).

47. *Presenting Questions.—Misconduct of Counsel.—Presumptions.*—Alleged misconduct of counsel in making statements outside the evidence in the argument to the jury is not available on appeal in the absence of the evidence from the record, and in such case it will be presumed in support of the trial court's ruling that the argument was confined to the evidence, and that appellant's objection was properly overruled, especially where the special bill of exceptions fails to disclose the nature of such objection. *Houk v. Harter*, 373, 374 (2).

48. *Ruling on Motion to Modify Judgment.—Failure to Save Exception.*—An assignment of error predicated on the action of the trial court in sustaining plaintiff's motion to amend and modify the judgment presents no question for review, where

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the record fails to set out the motion, and does not show that any objections were made, or exceptions taken, to the court's ruling on such motion.

Riley v. First Trust Co., Admr., 577, 580 (4).

49. *Directed Verdict.—Damages.—Submission to Jury.—Failure to Object.*—In an action for personal injuries, where the trial court, after directing a verdict for plaintiff, submitted to the jury the question of damages, and defendant made no objection before the verdict was returned and no claim that the practice was erroneous until filing its motion for a new trial, it could not complain on appeal.

Indianapolis Traction, etc., Co. v. Vaughn, 581, 585 (3).

(D) AMENDMENTS DEEMED MADE.

50. *Complaint.*—In an action on a replevin bond, the mere fact, as shown by the record on appeal, that the penalty stated in the bond was less than the verdict for plaintiff is not of controlling influence, as it will be presumed on appeal that the complaint and exhibit were amended below to correspond with the proof. *Aufderheide, Trustee, v. Heward*, 286, 288 (5).

(E) PRESUMPTIONS.

See also 47, 50; JUDGMENT 6; MASTER AND SERVANT 82.

51. *Review.—Evidence.—Erroneous Admission.*—If testimony is directed to some issue, or to some material question involved in the controversy, and its nature is such that it may have exercised some influence in determining such issue or question, its erroneous admission will be presumed to have been prejudicial, unless it otherwise affirmatively appears from the record.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 247 (9).

52. A ruling of the trial court is presumed to be correct until the contrary is affirmatively shown.

Pinkus v. Pittsburgh, etc., R. Co., 38, 41 (2).

53. *Favoring Judgment.—Omissions from Record.*—Where the evidence is not in the record, it must be assumed on appeal that the judgment below is in accordance with the evidence, so that grounds of a motion for a new trial that the verdict is contrary to law and that the jury erred in the assessment of the amount of recovery, present no question for review.

Aufderheide, Trustee, v. Heward, 286, 289 (7).

54. *Answers to Interrogatories.—General Verdict.*—In passing on a motion for judgment on the jury's answers to interrogatories, every reasonable presumption is indulged in favor of the general verdict, and the answers will not overcome if it can be sustained by any facts provable under the issues.

Continental Ins. Co. v. Bair, 502, 520 (9).

55. *Review.—Evidence.—Instructions.*—Where the evidence is not in the record, it will be presumed on appeal that the instructions given were applicable to the evidence, and they will not be held erroneous unless they would be so under any supposable state of facts which might have been given in evidence.

Boren v. Schweitzer, 475, 478 (2).

56. *Sufficiency of Evidence.—Scope of Review.*—On appeal every presumption lies in favor of the successful party, and in determining the sufficiency of the evidence to support the judgment, the court will look only to the evidence most favorable to appellee.

Bricker v. Whisler, 492, 497 (1).

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(F) QUESTIONS OF FACT, VERDICTS AND FINDINGS.

See also 70, 72.

57. *Evidence.—Sufficiency.*—In determining the sufficiency of the evidence to sustain the verdict, the court on appeal will look only to the evidence most favorable to appellee.
Supreme Lodge, etc. v. Graham, 220, 222 (1).
58. *Findings.—Conclusiveness.*—In an action for an injunction to restrain the obstruction of a drain across land claimed to have been impliedly dedicated to public use, whether the owner or his grantors intended to dedicate the way to the public was a question of fact which the trial court was to determine from the legitimate inferences to be drawn from all the evidence in the case, and the court's finding on such question is conclusive.
Town of Poseyville v. Gatewood, 50, 54 (4).
59. *Verdict.—Presumptions.*—In an action for damages sustained in an automobile collision at a street intersection, in the absence of a finding that plaintiff knew, at the time she saw defendant approaching, that he was driving recklessly, it will be assumed, if necessary to support the general verdict in plaintiff's favor, that she acquired such knowledge when defendant's car reached a point near her own, thus creating an emergency involving a possible collision and her own safety.
Mayer v. Mellette, 54, 59 (1).
60. *Findings.—Conclusiveness.—Survey by County Surveyor.*—In an appeal under §9518 Burns 1914, §5955 R. S. 1881, the question of the correctness of the survey is one of fact, and where there is evidence tending to support the trial court's decision sustaining the survey, the court on appeal cannot say as a matter of law that the line established is not the true boundary line, or hold that the decision is contrary to law.
Chitwood v. Garner, 290, 293 (4).
61. *Evidence.—Sufficiency.—Inferences from Facts Proved.*—Facts need not be proved by direct and positive evidence, since the court or jury may draw any reasonable inference of fact warranted by the evidence, and if a fact may be inferred from the facts and circumstances in evidence, it is sufficient on appeal.
Carter v. Richart, 255, 265 (7).
62. *Answers to Interrogatories.—Scope of Review.*—In reviewing the ruling on a motion for judgment on the jury's answers to interrogatories the court on appeal can consider only the general verdict, the interrogatories and answers thereto, and the issues formed by the pleadings.
Continental Ins. Co. v. Bair, 502, 520 (8).
63. *Findings of Fact.—Evidence.—Sufficiency.*—Where there is evidence to support the trial court's findings of fact, they will not be disturbed on appeal.
Benedict v. Bushnell, 365, 368 (3).
64. *Evidence.—Weight and Sufficiency.*—Where there is evidence to support every material allegation of the complaint, the court on appeal will not weigh conflicting evidence to determine its preponderance, and the decision of the trial court thereon is conclusive on appeal.
Cline v. Indianapolis Mortar, etc., Co., 383, 390 (5).
65. *Evidence.—Weight and Sufficiency.*—Where the record discloses that there was legal evidence to support the decision of

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the trial court, the court on appeal will not weigh the evidence to determine its preponderance in order to reverse the judgment.

Workman v. Rhodes, 413, 414 (2).

66. *Evidence.—Sufficiency.*—Where inferences may be drawn from the evidence which will support the decision of the trial court, the judgment will not be reversed on the ground of insufficiency of evidence.

Indianapolis Traction, etc., Co. v. Vaughn, 581, 585 (4).

67. *Directed Verdict.—Conclusiveness.*—Where both parties moved for a peremptory instruction, and defendant after its motion had been denied and plaintiff's motion had been granted, made no request for submission to the jury, the request for a directed verdict amounted to an admission that there was no conflict in the testimony and a request that the facts be determined by the court, and the finding made is conclusive on appeal if there is any evidence to support it.

Indianapolis Traction, etc., Co. v. Vaughn, 581, 582 (1).

68. *Verdict.—Excessive Recovery.*—Where, in an action on two notes, one for \$700 and the other for \$500, defendant counterclaimed for maintenance and support furnished plaintiff, and plaintiff's recovery was for less than the amount due on the \$700 note, the court on appeal cannot sustain defendant's contention that, because the undisputed evidence showed that the value of her services was approximately \$1,600, the jury must have found for her on her counterclaim and that the recovery was too large, since the jury may have found against defendant's counterclaim and against plaintiff on the \$500 note, in which case the verdict was too small.

Moore v. Ohl, 691, 698 (4).

(G) HARMLESS ERROR.

See also 40; RAILROADS 6.

69. *Admission of Evidence.*—If evidence is clearly immaterial, its erroneous admission is generally held to be harmless.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 246 (8).

70. *Findings of Fact.—Immaterial Errors.*—In an action on an accident insurance policy to recover total disability benefits, findings of fact that insured was removed to his home in a vehicle after the accident, when the evidence showed that he walked, and incorrectly fixing the date when the insured became afflicted with neuritis, are not harmful to the insurer, where the inaccuracies could in no way affect the ultimate fact of total disability found by the court.

American Liability Co. v. Bowman, 109, 125 (10).

71. *Refusal of Instructions.*—The rejection of an instruction, tendered in due time, and fairly stating the law as applied to the issues and the evidence, is reversible error, unless the subject-matter of such instruction is covered by others given, or it appears that the substantial rights of the party were not prejudiced by the refusal.

Indianapolis, etc., Traction Co. v. Sherry, 1, 6 (3).

72. *Directing Verdict.*—In a passenger's action against a railway company and a sleeping car company for the loss of jewelry through the negligence of the sleeping car company, error, if any, in directing a verdict in favor of the railway company was harmless to plaintiff where the jury by its verdict

APPEAL—Continued.

exonerated the sleeping car company from negligence, since the sleeping car company, the railroad's servant, being free from negligence, the master could not have been found negligent.

Pinkus v. Pittsburgh, etc., R. Co., 38, 43 (3).

73. *Argument of Counsel.—Reading from Document Not in Evidence.*—The fact that counsel in argument, over objection, read questions to and answers by the opposing party on cross-examination from an examination taken out of court before trial, and commented upon the same, was not prejudicial error, although the examination itself was not put in evidence, where the identical questions and answers referred to by counsel had gone into the record on cross-examination of the party at the trial.

Pinkus v. Pittsburgh, etc., R. Co., 38, 48 (7).

74. *Limiting Argument of Counsel.*—In a passenger's action against a carrier to recover for the loss of personal effects, it was not prejudicial to plaintiff to refuse her counsel permission to discuss the law relative to the validity of a provision in a passenger's check issued by defendant that "property taken into car will be entirely at owner's risk," where counsel was informed that he could read the instructions of the court as the law of the case and apply it to the facts, such instructions, although not referring specifically to the check or its contents, having correctly stated defendant's liability for the loss of the passenger's effects. *Pinkus v. Pittsburgh, etc., R. Co.*, 38, 48 (8).

75. *Immaterial Conclusions of Law.*—In an action to recover total disability indemnity under an accident insurance policy, a conclusion of law that insured's right to recover for disability suffered subsequently to the commencement of the action was not an issue, while not essential to the judgment for plaintiff, would not of itself be cause for reversal.

American Liability Co. v. Bowman, 109, 125 (9).

76. *Exclusion of Evidence.*—In an action on a fire insurance policy, error, if any, in excluding evidence relating to the insurer's knowledge of the use of gasoline on the premises insured, was harmless, where such evidence did not tend to disprove undisputed facts clearly establishing the insurer's knowledge of the practice.

Insurance Co., etc. v. Indiana Reduction Co., 330, 338 (11).

77. *Reversible Error.—Overruling Motion to Make More Specific.*—Section 343a Burns 1914, Acts 1913 p. 850, providing that any conclusion stated in any pleading must be considered and held to be equivalent to an allegation of all the facts required to sustain such conclusion when the same is necessary to the sufficiency of the pleading, subject to the right of the party affected thereby to move that the facts be stated, and, if the facts upon which material conclusions are based do not sufficiently appear from the pleading when read in its entirety, the overruling of a motion to make the pleading state them will constitute prejudicial and reversible error.

Indiana Mfg. Co. v. Coughlin, Admr., 268, 276 (1).

78. *Admission of Evidence.*—In an action for the death of a factory employe caused by an unguarded shaft coupling, error, if any, in the admission of evidence that after decedent's injury the shaft coupling and shaft were boxed and that such protection did not interfere with the running of the line shaft machinery, was rendered harmless by an instruction that such

APPEAL—Continued.

testimony was "no evidence or admission of any negligence on the part of defendant."

Indiana Mfg. Co. v. Coughlin, Admr., 268, 284 (12).

79. *Judgment.—Presumption.*—Every presumption is indulged in favor of the judgment of the trial court.

Aufderheide, Trustee, v. Heward, 286, 288 (4).

80. *Overruling Motion to Make Complaint More Specific.*—In an action for breach of a contract to employ plaintiff as part consideration for his release of claims for damages for personal injuries, although it would have been proper for the trial court to have sustained defendant's motion to make the complaint more specific by inserting therein the name of the person who acted as defendant's agent in making the alleged contract, the overruling of such motion was not prejudicial error where the record shows that before the institution of the suit defendants were fully advised as to who conducted the negotiations resulting in the settlement with plaintiff, that the agent reported the settlement to defendants shortly after he obtained the release, and that the release was produced by defendants at the trial and relied on as showing full payment to plaintiff.

Carter v. Richart, 255, 260, 261 (2).

81. *Evidence.—Admissibility.—Refusal to Suppress Deposition.*—In an action to recover damages for the alleged wrongful removal from plaintiffs' land of buildings erected thereon under a lease, where plaintiffs testified that they had an agreement with the lessee that they should have the buildings as a part of the rental consideration, and the only contradictory evidence consisted of improper and incompetent answers given by the lessee in his deposition, the trial court's denial of a motion to strike out such answers was harmful to plaintiffs.

Johnson v. Gephart, 322, 329 (8).

82. *Admission of Evidence.—Cure by Instructions.*—In an action to recover damages for the alleged wrongful removal of buildings erected by a lessee on plaintiffs' land, which adjoined a railroad right of way, error, if any, in the admission of testimony that the buildings in controversy were partly on plaintiffs' land and partly on the railroad's right of way was harmless, where the court instructed the jury that, if the lessee agreed with the plaintiffs to leave the buildings on their premises as their property, it should find for plaintiffs.

Johnson v. Gephart, 322, 329 (10).

83. *Examination of Witnesses.—Refusal to Strike Out Parts of Deposition.*—In an action to recover damages for the alleged wrongful removal from plaintiffs' land of certain buildings erected thereon under a lease and subsequently sold by the lessee to defendants, where the lessee, when asked by questions in his deposition whether he had been engaged in business in a certain city and if he knew the parties to the suit and whether plaintiffs claimed any right to the buildings prior to their sale, included in his answers statements to the effect that he had a right to sell the buildings, because he only rented the land for the year, that he agreed to, and did, pay one of the plaintiffs thirty dollars and also fifteen dollars to said plaintiff's wife, who claimed an interest in the land, that he just rented the ground and could do as he pleased with it, that it was customary for him in conducting his business to move his buildings

APPEAL—Continued.

from place to place, that he had a right to sell the buildings to defendants and they had a right to move them, and that it was the understanding between plaintiffs and himself that under the contract he could remove the structures at his pleasure, or allow a purchaser to do so, such statements were not responsive to the questions and involved conclusions of the witness, and it was reversible error, in view of the issues, for the trial court to overrule a motion to strike such answers from the deposition.

Johnson v. Gephart, 322, 328, 330 (5).

84. *Admission of Evidence*.—In an action against several railroads for injury to live stock while in shipment, where defendant connecting carrier's liability was fixed by reason of the fact that it accepted the stock knowing that it was unaccompanied and negligently failed to care for it, the question of the refusal of the initial carrier to permit the shipper to accompany the stock was immaterial, so that error, if any, in the admission of evidence relative to the initial carrier's refusal to allow the shipper to accompany the stock was harmless.

Chicago, etc., R. Co. v. Priddy, 552, 575 (12).

85. *Striking Out Motion for New Trial*.—Where defendants filed their application for a new trial with the clerk within thirty days from the date of judgment, but the record does not disclose that the trial court was in vacation at such time, so that the application could properly be filed with the clerk under the provisions of §587 Burns 1914, Acts 1913 p. 848, and it appears from §1461 Burns 1914, Acts 1913 p. 62, relating to the terms of the several circuit courts, that the application was filed on a date when the trial court might have been in regular session, the court on appeal cannot say that the trial court erred in sustaining plaintiff's motion to strike out the application for a new trial because not filed in open court, such motion containing a statement, which was uncontroverted by defendants, that the trial court was in session on the date the application was filed.

Riley v. First Trust Co., Admr., 577, 579, 580 (2).

86. *Exclusion of Evidence*.—In an action for personal injuries sustained in a collapse of a building being erected for the owner by an independent contractor, the exclusion of a municipal ordinance requiring permits to be obtained for the erection of buildings, and of evidence that defendant had failed to comply with the ordinance was harmless, where there was no evidence tending to show a causal connection between the violation of the ordinance and plaintiff's injury.

Looney v. Prest-O-Lite Co., 617, 628 (8).

87. Where, in an action for personal injuries, there could be no recovery by plaintiff under the undisputed evidence, intervening errors were harmless. *Looney v. Prest-O-Lite Co.*, 617, 627 (7).

88. *Instructions*.—Although a contract to furnish board and lodging was in writing, except that the method of ascertaining the amount of compensation required oral evidence, and was, technically, an oral contract, yet an instruction in an action on a note that defendant, who pleaded such contract by way of set-off and alleged it to be written, had the burden of proving that the contract was written was not prejudicial to her, where the evidence showed only that the contract was written and the instruction expressly authorized a recovery for the value of the service shown by the evidence independent of the contract.

Moore v. Ohl, 691, 696 (3).

APPEAL—Continued.

(H) WAIVER OF ERROR.

See also 30-34.

89. *Briefs*.—Errors assigned as grounds for new trial are waived by appellant's failure to present them in its briefs.

Insurance Co., etc. v. Indiana Reduction Co., 330, 338 (8).

90. *Briefs*.—Assigned error not presented in appellant's brief is deemed waived. *Riley v. First Trust Co., Admr.*, 577, 581 (5).

91. *Necessity of Timely Exception*.—Where defendant, knowing that the case had been dismissed and restored to the docket at a subsequent term without notice to or appearance by him, and that a default judgment was rendered in plaintiff's favor, moved to set aside the default and proceeded to defend without complaining of any irregularities in the prior proceedings, he waived any error in the trial court's action on plaintiff's motion to redocket the cause, and the ruling on such motion could not be challenged by defendant for the first time by an assignment of error on appeal.

Johnson v. First Nat. Bank, etc., 629, 634 (3).

(I) SUBSEQUENT APPEALS.

92. *Law of the Case*.—In an action upon a contract of insurance issued by a fraternal order, the holding of the Appellate Court in a former appeal that the acceptance of the written application constituted a written contract of insurance is the law of the case on a subsequent appeal.

Supreme Lodge, etc. v. Graham, 220, 224 (3).

ARGUMENT—

As part of brief, see APPEAL 20.

Of counsel, reading from document not in evidence, review, see APPEAL 73.

Of counsel, limiting, review, see APPEAL 74.

ASSIGNMENT OF ERRORS—

See APPEAL 16-19.

AUTOMOBILES—

Accidents, see APPEAL 59; DAMAGES 1; MUNICIPAL CORPORATIONS 3-6; NEGLIGENCE 1-3.

BAGGAGE—

See CARRIERS.

BAIL—

See also BASTARDS.

1. *Release of Sureties—Surrender of Principal*.—The sureties on a forfeited recognizance bond given in a bastardy proceeding may, as in other actions where the rules of civil practice prevail, surrender their principal before final judgment on the bond and be released from further liability without being required to pay costs. *State, ex rel. v. Smith*, 471, 473 (1).

2. *Criminal Cases—Forfeited Recognizance—Release of Sureties—Payment of Costs—Statute*.—In strictly criminal cases, §2027 Burns 1914, Acts 1905 p. 619, requires the surety on a

BAIL—Continued.

forfeited recognizance to pay, on the surrender of his principal before final judgment on the bond, such costs as the court may adjudge before he may be released from liability.

State, ex rel. v. Smith, 471, 473 (2).

BARTER—

Trust property, powers of trustee, see **TRUSTEES**.

BASTARDS—

See also **BAIL**.

Forfeited Recognizance.—Release of Sureties.—Though it is not a condition precedent to the discharge of the sureties on a forfeited recognizance bond given in a bastardy proceeding that on the surrender of their principal before final judgment on the bond, that such sureties were ready and willing to pay the costs and to confess judgment therefor on the surrender of their principal before final judgment on such a recognizance, shows a substantial compliance with §2027 Burns 1914, Acts 1905 p. 619, requiring sureties on forfeited recognizance in a criminal case to pay the costs on the surrender of their principal before they may be discharged from liability.

State, ex rel. v. Smith, 471, 474 (3).

BILLS AND NOTES—

See also **HUSBAND AND WIFE**; **JUDGMENT** 4, 7; **PLEADING** 9; **PROCESS**.

1. *Actions.—Judgment.—Liability of Defendants.—Presumption.*—Until the question of suretyship is judicially determined all defendants to a judgment on a note are deemed primarily liable, and cannot claim the statutory rights of sureties.

Hedges v. Mehring, 586, 598 (6).

2. *Negotiability.—Statutes.*—A note executed prior to the Negotiable Instruments Act, §9089a et seq. Burns 1914, Acts 1913 p. 120, and not payable in a bank in this state, is nonnegotiable.

Farmers', etc., Assn. v. Mason, 66, 75 (3).

3. *Rights of Sureties.—Statute.—Construction.*—Although §1269 Burns 1914, §1212 R. S. 1881, providing for the determination of issues between sureties joined as defendants speaks of sureties only, the statute is remedial in character and should receive a liberal construction.

Hedges v. Mehring, 586, 599 (9).

BOUNDARIES—

1. *Survey by County Surveyor.—Appeal.—Evidence.*—On an appeal to the circuit court from a survey by the county surveyor, as provided under §9518 Burns 1914, §5955 R. S. 1881, the court properly heard evidence of former surveys in connection with the survey in controversy, and was bound to give it such weight as it merited.

Chitwood v. Garner, 290, 292 (2).

2. *Survey by County Surveyor.—Failure to Appeal.—Conclusiveness of Survey.*—If a former survey was duly made affecting the same land, and the parties to the survey in controversy or their privies were parties to the former survey, it would be conclusive if not appealed from in three years, since §9518 Burns 1914, §5955 R. S. 1881, provides that an appeal from a survey by the county surveyor may be taken within three years.

Chitwood v. Garner, 290, 293 (3).

BOUNDARIES—Continued.

3. *Survey by County Surveyor.—Appeal.—Statute.*—Under §9518 Burns 1914, §5955 R. S. 1881, relating to appeals to the circuit court from surveys by the county surveyor, the ultimate question to be determined upon the trial by the circuit court is the correctness of the lines or corners established by the survey, and, if the court is satisfied from the evidence that the true boundary line has been established, the survey should be approved and a re-survey denied, though the result was not obtained by correct procedure in making the survey.

Chitwood v. Garner, 290, 292 (1).

BRIDGES—

- Construction.—Discretion of Board of Commissioners.*—Under §§3821, 7687 Burns 1914, §§2885, 5130 R. S. 1881, authorizing the building or repairing of bridges whenever in the opinion of the board of county commissioners such work is required for the convenience of the public, whether a bridge on a county highway shall be built is within the discretion of the board.

Martin v. Board, etc., 375, 381 (5).

BRIEFS—

See APPEAL.

BUILDINGS—

See FIXTURES.

BURDEN OF PROOF—

See EVIDENCE.

BY-LAWS—

Definiteness, when immaterial, see INSURANCE 64.

CARRIERS—

See also APPEAL 25, 72, 74, 84; RAILROADS.

1. *Carriage of Passengers.—Passenger's Effects.—Conversion.—Sufficiency of Evidence.—Delivery to Carrier.*—Where a passenger on a sleeping car did not part with the possession of a box containing jewelry, but merely placed it, with the knowledge of the carrier's servants, in an upper berth above the one occupied by herself, the carrier was not liable for conversion for loss of the jewelry.

Pinkus v. Pittsburgh, etc., R. Co., 38, 44 (4).

2. *Carriage of Passengers.—Transportation of Passenger's Personal Effects.—Duty of Carrier.*—Where a passenger's ordinary personal effects are retained in his possession, the carrier is not an insurer of their safety, but is liable only for the loss occasioned by failure to exercise reasonable care and caution to protect the same from loss or injury.

Pinkus v. Pittsburgh, etc., R. Co., 38, 46 (5).

3. *Carriage of Passengers.—Transportation of Passenger's Personal Effects and Money.—Duty of Carrier.*—When a passenger, without the knowledge of the carrier, has in his possession and control large sums of money or other property of exceptional value, the carrier is not liable for loss or injury thereto, as the carrier, under its contract of carriage, assumes

CARRIERS—Continued.

no obligation as to articles of property which form no part of the passenger's ordinary luggage or personal effects.

Pinkus v. Pittsburgh, etc., R. Co., 38, 46 (6).

4. *Injuries to Persons at Station.—Duty of Company.*—Where an interurban railroad, by its manner of operating its road, extended an invitation to all persons to station themselves near the tracks at a highway crossing, within a reasonable time before the arrival of a local car, if they desired to embark thereon as passengers, and to signal such car to stop by burning a match or scrap of paper, the road was under a duty to exercise reasonable care, in the operation of cars at such point, for the safety of one at the crossing who had given the customary signal to stop the car and was waiting to embark thereon.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 239 (1).

5. *Carriage of Freight.—Limitation of Liability.—Negligence.*—A carrier cannot by contract or otherwise exempt itself from liability for its negligence or that of its servants.

Chicago, etc., R. Co. v. Priddy, 552, 570 (6).

6. *Carriage of Freight.—Contract.—Scope.—Connecting Carriers.*—Where a consignment of freight is transported over several lines, the provisions of the contract entered into by the initial carrier are, if valid, for the benefit of the connecting carriers as well as the initial carrier, and such provisions must control the shipment.

Chicago, etc., R. Co. v. Priddy, 552, 570 (5).

7. *Carriage of Live Stock.—Value Fixed by Contract.—Effect.*—An agreement on values in a special contract governing a shipment of live stock only has the effect of limiting the amount of the carrier's liability to the stipulated value, and does not require that in case of loss the damage assessed should be for such portion of the real loss as the agreed value sustained to the actual value.

Chicago, etc., R. Co. v. Priddy, 552, 574 (9).

8. *Carriage of Live Stock.—Contract.—Limitation of Liability.*—Where a carrier refused to permit a shipper to accompany a shipment of live stock for the purpose of caring for and feeding the same while enroute, the carrier cannot urge as an excuse for its failure to give the stock proper care, and as evidence of its reasonable and ordinary care in that respect the fact that such duty was assumed by the consignors under a special contract governing the shipment.

Chicago, etc., R. Co. v. Priddy, 552, 573 (8).

9. *Carriage of Live Stock.—Negligence.—Liability of Carrier.*—Though a special contract under which a carload of mules was shipped imposed upon the shipper the duty of accompanying and caring for the stock while being transported, such contract, upon the shippers being refused permission to accompany the shipment, did not relieve the carrier, or any of its connecting lines, from liability for injury resulting from negligent failure to properly care for, feed and water the mules while enroute, since a carrier cannot exempt itself from liability for its own negligence.

Chicago, etc., R. Co. v. Priddy, 552, 570 (7).

10. *Carriage of Live Stock.—Contract.—Construction.—Injury to Stock.—Notice of Claim.*—A provision in a live stock shipping contract for notice to the carrier of a claim for damages before

CARRIERS—Continued.

the removal of the stock and before it is mingled with other stock to be valid must be reasonable, and should be given a reasonable construction in view of the facts of each particular case. *Chicago, etc., R. Co. v. Priddy*, 552, 575 (13).

11. *Carriage of Live Stock.—Injury to Stock.—Notice of Claim.—Compliance with Shipping Contract.*—In an action for injury to a carload of mules while in shipment, where the evidence showed that an agent of the delivering carrier was present when removed from the car and saw their condition, which required immediate attention, and which did not reveal the extent of their injury, and seven days after delivery the agent of the delivering carrier was served with a written notice containing an itemized statement of plaintiff's claim, there was a sufficient compliance with a stipulation in the contract of shipment requiring the giving of a written notice of a claim for damages before the removal of the stock from the carrier's premises and before it is mingled with other stock.

Chicago, etc., R. Co. v. Priddy, 552, 576 (14).

12. *Carriage of Live Stock.—Evidence.—Admissibility.*—In an action against several railroads for injury to live stock while in shipment, where defendants contended that the special contract under which the shipment was made required the shipper to accompany and care for the consignment, evidence as to the initial carrier's refusal to permit the shipper to accompany the stock was admissible to explain his failure to do so.

Chicago, etc., R. Co. v. Priddy, 552, 575 (11).

CARS—

See **CARRIERS**.

CASES—

Cited, see p. vi.

Reported, see p. iii

Disapproved, see **MECHANICS' LIENS** 2.

Overruled, see **RAILROADS** 8.

COHABITATION—

As evidence of common-law marriage, see **MARRIAGE** 3-5.

COLLATERAL ATTACK—

See **JUDGMENT** 2-4.

COMMISSIONERS—

Board of, see **BRIDGES**; **COUNTIES**.

COMPLAINT—

See **PLEADING**.

CONCLUSIONS—

See **PLEADING** 4-7; **TRIAL** 2.

Of law, review, see **APPEAL** 15, 25, 75, 77.

Of witness, on examination, see **APPEAL** 83; **EVIDENCE** 1, 4.

CONSIDERATION—

See **APPEAL 80; CONTRACTS 4, 7.**

CONSTRUCTION—

See **CONTRACTS; EVIDENCE 9; INSURANCE 1-3, 10-17, 22, 30, 43, 45-49, 53, 64, 65; STATUTES; WILLS.**

CONSTRUCTIVE KNOWLEDGE—

Evidence of, admissibility, see **INSURANCE 20.**

CONTRACTORS—

Independent, liability, see **MASTER AND SERVANT 4-6.**

CONTRACTS—

See also **APPEAL 80, 88, 92; CARRIERS 5-12; DEEDS; ESTOPPEL 4-6; FIXTURES 4; FRAUDS, STATUTE OF; HUSBAND AND WIFE; INSURANCE; MASTER AND SERVANT; PRINCIPAL AND AGENT.**

Breach, contract of employment, action, see **MASTER AND SERVANT 2, 3.**

1. *Written. — Construction.* — Such a construction of a written contract will be adopted, if possible, as will make it effectual to carry out the intention of the parties as gathered from the whole instrument.

Globe, etc., Ins. Co. v. Hamilton, 541, 546 (5).

2. *Written.—Construction.—Parol Evidence.—Admissibility.—Intent.* —Although parol evidence is not admissible to change or modify a contract in writing, such testimony may be admitted to enable the court to properly apply a written contract to the subject-matter, and, in case of ambiguity, to remove the uncertainty.

Globe, etc., Ins. Co. v. Hamilton, 541, 545 (3).

3. *Written. — Construction. — Parol Evidence.—Admissibility.—Ambiguity.* —Where the language employed in a contract is ambiguous or subject to variations in meaning depending upon circumstances and conditions, or the relation in which it was used, parol testimony may be received to inform the court of the conditions out of which the contract arose, so that it may be enabled to more accurately ascertain the intent and meaning of the parties as evidenced by their contract.

Globe, etc., Ins. Co. v. Hamilton, 541, 546 (4).

4. *Contract of Employment.—Definiteness.* —A contract, in part consideration for the release of claims for personal injuries, to employ claimant at his old wages "as long as he was able to perform labor," there being evidence to show his average wage for several years, was sufficiently definite to make a valid and enforceable contract.

Carter v. Richart, 255, 266 (8).

5. *Parol Contracts.—Parol Evidence.* —A contract partly in writing and partly in parol becomes a mere verbal contract, and, where it is necessary to resort to oral evidence to establish the terms of a contract, then the whole contract is regarded as being verbal.

Moore v. Ohl, 691, 695 (2).

6. *Parol Evidence. — Admissibility. — Agency of Party to Contract.* —In an action for breach of contract, plaintiff may show by parol evidence that the other signer acted, in the execution of the contract, as defendant's agent, although it was not indicated in any way either by the contract or signature, since in

CONTRACTS—Continued.

contracts other than negotiable instruments and those under seal, parol evidence is admissible to charge the real principal, although executed in the name of the agent and nothing appears to show that he is not the principal.

Boren v. Schweitzer, 475, 477 (1).

7. *Release.—Consideration.—Proof by Parol.*—The execution of a release for all claims for personal injuries in consideration of a specified sum of money does not preclude the claimant from showing the actual consideration for which the instrument was executed.

Carter v. Richart, 255, 266 (9).

CONTRIBUTORY NEGLIGENCE—

See NEGLIGENCE; RAILROADS; STREET RAILROADS.

CONVERSION—

See TROVER AND CONVERSION.

CORPORATIONS—

See also RECEIVERS.

1. *Debts.—Money Borrowed from Officers.—Liability.*—Where money is advanced to a corporation by its managing officers or directors, the transaction will be closely scrutinized to determine whether it was fair and just, and the conduct of the officers free from fraud, and such transactions, when not duly authorized, are usually regarded as voidable at the election of the corporation.

Welliver, Rec., v. Coate, 195, 216 (5).

2. *Powers.—Right to Borrow Money.*—In the absence of a prohibitory provision in its charter or in its enabling and governing act, it is neither illegal nor *ultra vires* for a corporation to borrow money to carry out the purposes for which it was organized.

Welliver, Rec., v. Coate, 195, 213 (3).

CORROBORATION—

See WITNESSES 1.

COSTS—

Payment, when necessary to release surety, see BAIL.

1. *Payment.—Stay of Subsequent Proceedings.—Discretion of Court.*—A stay of proceedings until the payment of costs in a former action generally relates to a second suit based on the same cause of action as a prior suit, and the stay cannot be obtained as a matter of absolute right, but the request therefor presents a question of sound judicial discretion to be exercised by the court in accordance with the facts and circumstances of each particular case.

Carter v. Richart, 255, 262 (5).

2. *Payment.—Stay of Subsequent Proceedings.—Discretion of Trial Court.*—The refusal to stay proceedings, in an action for breach of a contract to employ plaintiff as part consideration for his release of claims for damages for personal injuries, until plaintiff paid the costs in a prior action for the injuries, was not an abuse of the trial court's discretion, the former suit being a different cause of action, since it was predicated on the right to recover for the injuries only.

Carter v. Richart, 255, 262 (4).

COUNTERCLAIM—

Excessive recovery, review, see **APPEAL 68.**

COUNTIES—

See **BRIDGES.**

Appointment of County Engineer.—Powers of Board of County Commissioners.—Statute.—Section 9511 Burns 1914, Acts 1911 p. 185, providing that if the county surveyor is not a competent civil engineer, the board of commissioners may appoint another to have charge of certain engineering work, but the surveyor may have a hearing as to his competency before the county judge, does not require a formal hearing or finding by the board as to the competency of the surveyor, and the finding of the board is conclusive unless set aside after the hearing provided by the statute. *Martin v. Board, etc.*, 375, 382 (6).

COURTS—

See also **APPEAL.**

1. **Jurisdiction.—Judgment.**—Where the Appellate Court is without jurisdiction in an appeal, anything it may do will be a nullity. *Nation v. Green*, 136, 138 (2).
2. **Supreme Court.—Jurisdiction.—Appeals from Interlocutory Orders.—Statute.**—Under §1392d, cl. 16, Burns 1914, Acts 1907 p. 237, providing that appeals from interlocutory orders for the delivery of the possession of real property or the sale thereof shall be taken directly to the Supreme Court, the Supreme Court has exclusive jurisdiction in an appeal from an interlocutory order for the sale of a decedent's real estate on petition of the executors. *Nation v. Green*, 136, 139 (4).
3. **Jurisdiction of Subject-Matter.—Right to Question.**—Jurisdiction of the subject-matter is conferred only by law, and the jurisdiction of the appellate court to decide a case may be questioned even after decision. *Nation v. Green*, 136, 137 (1).
4. **Rules.—Force and Effect.**—Court rules have the force and effect of law, and the duty to observe and follow them rests on litigants and courts alike, where there is no valid reason for their nonobservance. *Chicago, etc., R. Co. v. Priddy*, 552, 558 (2).
5. **Transfer of Cases.—Effect.—Jurisdiction.**—Where a petition to transfer raised the question of the jurisdiction of the Appellate Court to review a case, the action of the court in transferring the case to the Supreme Court was an express holding that jurisdiction was in that court, and assumption of jurisdiction by the Supreme Court was at least an implied holding to the same effect. *Nation v. Green*, 136, 138 (3).

CREDITORS—

General, avoidance of fraud, see **RECEIVERS.**

CROSS-COMPLAINT—

What constitutes, see **PLEADING 11.**

Failure to answer, waiver, see **PLEADING 8.**

Service, necessity, see **PROCESS.**

CROSSINGS—

See **CARRIERS 4; RAILROADS.**

DAMAGES—

Submitting question to jury, failure to object, review, see **APPEAL 49.**

Elements of, in trespass, see **TRESPASS 3.**

Excessive, review, see **APPEAL 25; NEW TRIAL 1, 3.**

1. *Injury to Automobile.—Evidence.—Sufficiency.*—In an action for damages to an automobile testimony, "I don't know what it cost to repair it, but I know there was paid out \$420 to fix it up in running order," being the only evidence on the subject of damages, is insufficient to sustain a verdict for plaintiff, since such evidence furnishes no basis for estimating the damages, especially where the automobile was a second-hand machine and not in first-class condition at the time of the accident.
Indianapolis, etc., Traction Co. v. Sherry, 1, 7 (5).

2. *Personal Injuries.—Measure of Damages.—Instructions.*—In a servant's action for the loss of an arm and for other personal injuries, an instruction on the measure of damages limiting recovery to compensatory damages as shown by the evidence, and directing the jury in estimating plaintiff's damages, to consider only his crippled and maimed condition, and the nature, extent and duration thereof, the physical and mental pain he suffered because of the injuries, the length of time he was confined or unable to work, the diminution of his earning capacity, and the probable duration of his life, is not erroneous as permitting the consideration of improper elements of damages.
Peacock Coal, etc., Co. v. Crawford, 401, 407 (8).

DANGEROUS MACHINERY—

See **MASTER AND SERVANT 17-19.**

DEATH—

Of party, substitution of personal representative, see **APPEAL 7.**

Wrongful, action, see **MASTER AND SERVANT 16, 17.**

1. *Death of Minor Child.—Elements of Damage.*—In estimating the damages of a parent for the death of his minor child, the value of the services of the child from the time of the injury until he becomes of age, less the cost of his support and the expense caused the parent because of the injury and death, should be considered.

Pere Marquette R. Co. v. Chadwick, 95, 101 (4).

2. *Action.—Nuisance.—What Constitutes.—Statutes.*—Although an action for wrongful death caused by a nuisance is not predicated upon §291 Burns 1914, §289 R. S. 1881, defining a nuisance, the statutory definition, which is broader than the common-law definition and includes, in addition to damage to property, injury to life, is applicable in determining what constitutes a nuisance.

Pere Marquette R. Co. v. Chadwick, 95, 101 (3).

3. *Death of Minor Child.—Father's Right to Sue.*—Although a father and son reside in property owned by the wife, the father can maintain an action, independently of any right to recover

DEATH—Continued.

for damage to property, for the death of a minor son caused by a nuisance maintained near the dwelling house.

Pere Marquette R. Co. v. Chadwick, 95, 99 (2).

4. *Negligent Death.—Measure of Damages.—Instructions.*—In an action for wrongful death, an instruction that the jury might consider, in determining the amount of damages, whether decedent's parents would probably have received from him such personal attention and services as are usually rendered by a son living with his parents, taking into consideration all the evidence bearing on decedent's character, habits, disposition, conduct, love for his parents and all other facts and circumstances in evidence enabling the jury to decide the pecuniary loss suffered by the father and mother, and that the verdict should compensate them for their pecuniary loss, is not erroneous as permitting the jury to go outside the evidence or as allowing them to consider improper elements of damage.

Indiana Mfg. Co. v. Coughlin, Admr., 268, 285 (13).

5. *Action by Father for Death of Child.—Pleading.—Complaint.*—In an action by a father against a railroad company for the death of a minor child, a complaint alleging that plaintiff, his wife and children resided in property owned by the wife, that defendant created a nuisance in proximity to plaintiff's home by depositing putrid and decaying offal on its right of way, and that the death of the child was caused by the unwholesome and poisonous vapors generated by such nuisance, and praying a recovery only for the loss of the child's services and for the expenses of last illness, states a cause of action for wrongful death, and not for damage to the realty owned by the wife, the allegations as to ownership being merely for the purpose of explaining the rightful presence of plaintiff and his child on the premises. *Pere Marquette R. Co. v. Chadwick*, 95, 97 (1).

DEDICATION—

Question of fact, findings, conclusiveness, see **APPEAL** 58.

1. *Implied Dedication.—Requisites.—Intent.*—An implied dedication of land is one arising by law, from the acts of the owner, and the intention to dedicate, which is the foundation and vital element of every dedication, must clearly appear before a dedication can be implied.

Town of Poseyville v. Gatewood, 50, 52 (1).

2. *Implied Dedication.—Intent.—Evidence.*—The extent and character of the use of land is not in itself sufficient to show an intention to dedicate, nor is the time during which the user has been permitted, or mere nonaction, or acquiescence, or non-assertion of the title, sufficient, but such facts and any other circumstances bearing on that subject have probative force in determining whether there was in fact an intention to dedicate.

Town of Poseyville v. Gatewood, 50, 53 (3).

3. *Implied Dedication.—When Intent Inferred.*—Where the acts and conduct of a landowner are such as fairly and naturally lead to the conclusion that he intended to dedicate the land to the public use, and others have in good faith acted upon his open acts and conduct, he will not be permitted to aver that there was no dedication, but the law will conclusively infer that he intended what his acts and conduct indicated, regardless of any secret intent. *Town of Poseyville v. Gatewood*, 50, 52 (2).

DEEDS—

See **ACKNOWLEDGMENT**; **ESTOPPEL**; **EVIDENCE 2**; **FRAUDS, STATUTE OF**; **TRESPASS 4**.

1. *Delivery.—Wrongful Possession.*—Where one steals a deed to land and wrongfully inserts his name as grantee, there is no delivery. *Allen v. Powell*, 601, 612 (4).
2. *Delivery.—Wrongful Possession.*—A writing in the form of a deed that passes into the possession of the named grantee without the knowledge, consent, or acquiescence of the grantor, and with no intent to deliver it, is ineffectual to pass title to the grantee. *Allen v. Powell*, 601, 612 (6).
3. *Delivery.*—Where the owner of land voluntarily left a deed, which was properly signed and acknowledged but blank as to the grantee, in her agent's possession so that he might hold it for her until the abstracts were examined, and a conveyance might be subsequently completed by her, there was no delivery to the agent. *Allen v. Powell*, 601, 612 (5).
4. *Foreign Deeds.—Sufficiency.*—A deed for real estate in Indiana executed in another state, though differing in form from that authorized by statute in this state, may nevertheless convey title.
Ingram v. Jeffersonville, etc., Transit Co., 532, 537 (1).

DELIVERY—

See **DEEDS**.

DEMURRER—

Ruling on, assigning as error, see **APPEAL 2**, 39-41, 43.

DEPENDENTS—

Under Workmen's Compensation Act, see **MASTER AND SERVANT**.

DEPOSITIONS—

See **EVIDENCE 3**.

Ruling on motion to strike out, assignment of error, see **APPEAL 19**, 81, 88.

DESCENT AND DISTRIBUTION—

Of property of incompetents, effect of change of domicil, see **DOMICIL 3**, 6.

DISCRETION—

Of commissioners, see **BRIDGES**.

Of court, see **COSTS**.

Of Industrial Board, see **MASTER AND SERVANT 69**.

DISMISSAL AND NONSUIT—

Dismissal of appeal, see **APPEAL 18**, 27.

Dismissal of Action.—Reinstatement.—Proceedings.—Pleading.—Notice to Defendant.—Statute.—Under §405 Burns 1914, §396 R. S. 1881, providing that the court shall relieve a party from any judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, on complaint or motion

DISMISSAL AND NONSUIT—Continued.

filed within two years, the application to be relieved from a judgment, if made at a subsequent term, is in the nature of a new proceeding, and the party in default must proceed by a pleading in the nature of a complaint, and, in the absence of an appearance by the opposing party, notice is required; hence, where an action was dismissed for want of prosecution, it was error for the trial court at a subsequent term to restore the cause to the docket on the verbal application of plaintiff, without notice to, or appearance by, the defendant.

Johnson v. First Nat. Bank, etc., 629, 632 (1).

DOMICIL—

1. *Nature of.*—The term "domicil" is expressive of a relation between person and place, and indicates various degrees of comprehensiveness, as there may be a national domicil, relating to residence in a nation, a quasi-national domicil, relating to residence in a state, and a municipal or domestic domicil, relating to residence in a county, township or municipality.
Hayward v. Hayward, Admr., 440, 451 (7).
2. *Change of Domicil.*—*What Constitutes.*—To constitute a change of domicil there must be residence at another place, and an intention to abandon the old domicil and to acquire a new one.
Hayward v. Hayward, Admr., 440, 450 (4).
3. *Change of.*—*Incompetent Persons.*—*Descent and Distribution.*—As a change in municipal domicil involves no laws affecting the descent and distribution of property the courts are more liberal in recognizing the power of a proper representative to change the municipal domicil of an incompetent person or a person *non sui juris* than where the change is of national or quasi-national domicil.
Hayward v. Hayward, Admr., 440, 451 (8).
4. *Domicil of Insane Person.*—*Change of.*—*Powers of Guardian.*—*Order of Court.*—An appointed guardian may change the quasi-national domicil of his ward only by proceeding under an order of court. *Hayward v. Hayward, Admr.*, 440, 462 (12).
5. *Insane Persons.*—*Change of Domicil.*—*Powers of Guardian.*—The guardian of an insane person does not have the power or authority, by virtue of his office, on his own motion to change the legal domicil of his ward from one state to another, so as to affect the distribution or succession of the ward's property on his decease, and especially where the ward, although residing in the jurisdiction of the appointment, is legally domiciled in another state. *Hayward v. Hayward, Admr.*, 440, 460 (10).
6. *Quasi-National.*—*Change of.*—*Incompetent Person.*—*Authority of One not Related.*—Where decedent was mentally incompetent, the mother of her next of kin, who was not related to deceased by blood and not her legal guardian, could not on her own motion or at request of decedent affect a change in the latter's domicil from one state to another so as to change the law governing the descent and distribution of property.
Hayward v. Hayward, Admr., 440, 452 (9).
7. *Change of by Incompetent Person.*—*Intent.*—*Time of Residence.*—Where one mentally incompetent was removed by relatives from her domicil in one state to another state, she could not, because of her mental incapacity, have formed an intention

DOMICIL—Continued.

to change her domicil, and the length of time that she resided in the latter state is of itself unimportant.

Hayward v. Hayward, Admr., 440, 451 (6).

8. *Residence.*—Domicil means more than residence, since a domicil is a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time, and, while a man may have several residences at the same time, he can only have one domicil at a time and may be a resident of a particular locality without having a domicil there. *Hayward v. Hayward, Admr., 440, 449 (5).*

EMPLOYER'S LIABILITY ACT—

See MASTER AND SERVANT 8-12. .

EMPLOYEES—

See MASTER AND SERVANT.

EQUITY—

See ESTOPPEL; INJUNCTION; INSURANCE 38.

ESTOPPEL—

See also HUSBAND AND WIFE 3; INSURANCE 4, 5.

1. *Pleading Specially.*—Matters in estoppel must be pleaded specially. *Trinkle v. Ladoga Building, etc., Assn., 415, 423 (6).*
2. *Burden of Proof.*—One relying on estoppel has the burden of establishing all the facts necessary to constitute it.
Allen v. Powell, 601, 616 (11).
3. *Equitable Estoppel.*—Where one of two innocent persons, each guiltless of an intentional moral wrong, must suffer a loss occasioned by the wrongful conduct of another, the loss must be borne by him whose conduct enabled the injury to be inflicted.
Allen v. Powell, 601, 614 (9).
4. *Estoppel by Acquiescence.*—In an action to quiet title, where it appeared that plaintiff executed a deed, which was blank as to the grantee, and left it with her agent, who wrongfully filled in his own name and sold the land, the situation was sufficient to present an issue for the jury as to whether plaintiff was estopped by her conduct in not immediately asserting her rights to deny the validity of the deed as against innocent purchasers who acquired title subsequently to her discovery of the agent's action.
Allen v. Powell, 601, 614 (8).
5. *Estoppel by Laches.*—Where a person named as grantee in a deed, of which there is no legal delivery, wrongfully obtains possession of it and causes it to be recorded, the grantor, on acquiring knowledge of the facts, is required to act promptly to prevent innocent third persons from acting to their prejudice in relying on the record, and by failing to do so such grantor will be estopped by laches from asserting his title against an innocent purchaser.
Allen v. Powell, 601, 615 (10).
6. *Estoppel by Laches.—Burden of Proof.—Instruction.*—In an action to quiet title, where it appeared that grantor knew that she had not delivered the deed therefor, but that her grantee had fraudulently procured such deed and, after inserting his own name as grantee, had it recorded, and she remained in-

ESTOPPEL—Continued.

active for several weeks after acquiring full knowledge of the facts, during which time conveyance was made to innocent purchasers, who relied on the record, such facts were sufficient *prima facie* to constitute estoppel, and the burden was upon the grantor to show any mitigating facts and circumstances to avoid the estoppel, so that an instruction that the burden was on the innocent purchasers to prove that there was no such mitigating circumstances was erroneous.

Allen v. Powell, 601, 616 (12).

7. *Estoppel by Silence*.—A person may be estopped by his silence, where it is his duty and there is opportunity for him to speak, or by his passivity where an obligation and an opportunity to act exists, but he must have knowledge of the facts and his rights.

Allen v. Powell, 601, 614 (7).

EVIDENCE—

See also **WITNESSES**.

For evidence as to particular issues or in particular actions or proceedings, see also the specific topics.

For review of rulings as to evidence, see **APPEAL** 13, 36, 45, 47, 51, 53, 55-68, 69, 76, 78, 81, 82, 84, 86, 87.

Reception at trial, see **TRIAL**.

Burden of proof, see also **ADVERSE POSSESSION**; **APPEAL** 88; **ESTOPPEL** 2, 6; **INSURANCE** 50; **MASTER AND SERVANT** 84, 92; **STREET RAILROADS** 2; **TROVER AND CONVERSION** 1.

Presumptions, see **BILLS AND NOTES** 1; **INSURANCE** 31; **MARRIAGE** 2; **MASTER AND SERVANT** 95.

1. *Conclusions.—Admissibility*.—Evidence in the nature of conclusions is not admissible.
Insurance Co., etc. v. Indiana Reduction Co., 330, 338 (10).

2. *Deeds.—Admissibility*.—In an action in trespass by one claiming ownership of certain lands, where a deed for the land to A was admitted in evidence, a later deed to plaintiff purporting to have been executed by the heirs of A and the trustee under his will shows sufficient connection between the grantee of the first deed and the grantors of the second to warrant the latter's admission in evidence as tending to show title in plaintiff.

Ingram v. Jeffersonville, etc., Transit Co., 532, 538 (3).

3. *Depositions.—Conclusions.—Striking Out*.—The rule making incompetent opinions or legal conclusions applies as well to evidence presented by deposition as to the examination of a witness before the jury.

Johnson v. Gephart, 322, 329 (7).

4. *Fact in Issue.—Conclusion*.—In an action upon a fraternal order certificate of insurance, a question to a witness as well to an answer as to when he determined to approve an application for insurance and accept the risk was improper, as calling for a conclusion, where it was for the jury to determine the time of the final approval of the insurance contract.

Supreme Lodge, etc. v. Graham, 220, 225 (4).

5. *Inferences from Facts Proved.—Sufficiency*.—It is not essential that facts be established by direct and positive testimony, and it is sufficient on appeal if from the facts and circum-

EVIDENCE—Continued.

stances proved the jury may reasonably have inferred the ultimate and essential facts necessary to sustain the verdict.

Continental Ins. Co. v. Bair, 502, 526 (19).

6. **Judicial Knowledge.—Location of City.**—The Appellate Court judicially knows that the city of Indianapolis is in Marion county, Indiana.
In re Industrial Board, 550, 552 (2).

7. **Judicial Notice.—Sessions of Court.—Records.**—In passing on a motion to strike out an application for new trial, because not filed in open court, the trial court was required to take judicial knowledge of its terms, the dates when in session, and of its own records, regardless of the affidavits of the parties, and was bound by such knowledge.

Riley v. First Trust Co., Admr., 577, 580 (3).

8. **Opinion Evidence.—Operation of Electric Car.—Competency of Witness.**—Experience in operating a locomotive engine does not necessarily or even presumptively qualify a person to operate an interurban electric car, or to speak as an expert with reference to what good railroading requires in operating such cars.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 248 (10).

9. **Opinion Evidence.—Construction of Contracts.**—In an action to recover damages for the alleged wrongful removal of certain buildings from plaintiffs' land, where the question at issue and the ultimate fact to be determined by the jury was whether the lessee, who erected the structures and subsequently sold them to defendants, agreed to give the plaintiffs the buildings in controversy as a part consideration for use of the land, the lessee's testimony that he had a right to sell the buildings or remove them and that this was the understanding between himself and plaintiffs was incompetent as the expression of an opinion concerning the construction of the lease.

Johnson v. Gephart, 322, 328 (6).

10. **Res Gestae.**—In an action to quiet title, where plaintiff claimed that her grantee wrongfully obtained possession of the deed, which was signed and acknowledged but blank as to the grantee, and inserted his own name in the blank left for that of the grantee, plaintiff was properly permitted to testify to statements made by such grantee, in the absence of defendants, on the occasion of her visit to his office to discuss a proposed sale of the land by him for her, such statements being *res gestae*.

Allen v. Powell, 601, 609 (2).

EXCEPTIONS—

To ruling, reserving questions, see **APPEAL 4**, 48, 91.

EXCEPTIONS, BILL OF—

See **APPEAL 14**, 46.

EXECUTORS AND ADMINISTRATORS—

Substitution, on death of party after judgment and before perfection of appeal, see **APPEAL 7**.

EXPRESS TRUSTS—

See **TRUSTS**.

FACTORY ACT—

See MASTER AND SERVANT 16-19.

FINDINGS—

See TRIAL 2-5.

Review of, see APPEAL 15, 57-68.

FIRE INSURANCE—

See INSURANCE.

FIXTURES—

1. *Building.—Intention of Party Annexing to Land.*—Where an abandoned glass factory was intended at the time of its erection as a permanent building, and its physical connection with the land remained the same as when originally built, it became a part of the realty. *Bricker v. Whisler*, 492, 499, 500 (6).
2. *Between Vendor and Purchaser.—Separate Ownership of Building and Land.—Knowledge of Purchaser.—Annexation.*—Where a vendor of realty had subsequently to acquiring his title, purchased from a third person an abandoned glass factory located on the land, the fact that a separate ownership of building and land had existed and that part of the building had been removed by its former owner, was not controlling in determining, as between the vendor and his grantee, whether the building, which was annexed to the land, was real or personal property, especially where the grantee had no knowledge of the separate ownership. *Bricker v. Whisler*, 492, 499 (7).
3. *Nature of.—Manner of Annexation.—Adaptability.—Intention of Party Making Annexation.*—In determining whether property annexed to the freehold is personal or real property, the real or constructive annexation of the article, its adaptability to the use of the land to which it is attached, and the intention of the party making the annexation, are considerations of controlling influence. *Bricker v. Whisler*, 492, 498 (5).
4. *Permanent Building.—Parol Reservation by Vendor.—Effect.*—A parol agreement between grantor and grantee, prior to, or contemporaneous with, a conveyance, to the effect that a part of a permanent building which is attached to and part of the freehold conveyed by the grantor is personal property will not make such property personalty which may be reserved orally, notwithstanding the vendor's written warranty of the freehold to the contrary. *Bricker v. Whisler*, 492, 500 (8).

FORFEITURE—

See INSURANCE.

FRAUD—

See CORPORATIONS 1; INSURANCE 5, 6; RECEIVERS.

FRAUDS, STATUTE OF—

Conveyance of Land.—Parol Reservation.—As between grantor and grantee, the grantor cannot enforce a parol reservation of any part of the realty conveyed in his deed.
Bricker v. Whisler, 492, 498 (4).

FREIGHT—

See **CARRIERS** 5, 6.

GUARDIAN AND WARD—

See **INSANE PERSONS**.

Power of guardian to change domicil of insane ward, see **DOMICIL**.

HARMLESS ERROR—

See **APPEAL** 69-88.

HEIRS—

Substitution on death of party, when necessary, see **APPEAL** 7.

HUSBAND AND WIFE—

See also **MARRIAGE**; **PLEADING** 9.

1. *Liability on Notes.—Judgment.*—Where a husband and wife received the consideration for their promissory note jointly, and applied it on the purchase price of realty held by them by the entireties, the lender is entitled, in an action on the note and to foreclose a mortgage, to a judgment against both husband and wife and to a decree of foreclosure against the real estate.
Trinkle v. Ladoga Building, etc., Assn., 415, 422 (3).
2. *Loans.—Wife as Principal.*—In an action against husband and wife to recover on a promissory note and to foreclose a mortgage, if the money was paid to her and her husband, and was used by them to purchase real estate held by them jointly as tenants by the entireties, she is not a surety but a principal.
Trinkle v. Ladoga Building, etc., Assn., 415, 422 (2).
3. *Loan to Both.—Wife's Liability.—Wife's Representations.—Estoppel.*—Where a married woman, for the purpose of inducing another to grant her a loan, makes representations in an affidavit to the effect that the money is for her own use and benefit and that she is not a surety, and her representations are acted upon in good faith, she is estopped thereafter from setting up that she is surety and therefore not liable, even though the transaction does not come within the provisions of §7856 Burns 1914, Acts 1903 p. 394, relating to loans to married women. *Trinkle v. Ladoga Building, etc., Assn.,* 415, 425 (11).
4. *Loan to Wife.—Statute.—Construction.*—Section 7856 Burns 1914, Acts 1903 p. 394, providing that when a married woman shall borrow money on her note and the proceeds of the loan shall be paid to her in cash, or by check or draft payable to her order, and she makes affidavit that the money is for her own use, she shall not be permitted to thereafter claim that the loan was made for the use and benefit of any person other than herself, is, within its scope, merely declaratory of the common law, and does not abrogate the prior statute (§7853 Burns 1914, §5117 R. S. 1881), providing that a married woman shall be bound by an estoppel *in pais* like any other person.
Trinkle v. Ladoga Building, etc., Assn., 415, 425 (10).
5. *Loans to Wife.—Statute.—Scope and Applicability.*—Section 7856 Burns 1914, Acts 1903 p. 394, providing that a married woman who executes and delivers her promissory note or other evidence of indebtedness for the purpose of securing a loan, and states under oath that the money is to be for her own separate

HUSBAND AND WIFE—Continued.

use or the betterment of her property or separate business, shall not be permitted thereafter to claim that such loan was made for the use and benefit of any person other than herself, has no application to transactions wherein the proceeds of a loan to a married woman are not paid in cash, or by check or draft payable to her order.

Trinkle v. Ladoga Building, etc., Assn., 415, 425 (9).

6. *Loan to Wife.—Suretyship.—Duty of Obligee to Make Inquiry.*—Where one contemplating loaning money to a married woman makes due inquiry, in good faith, to ascertain whether the money is to be for her use and benefit, he may rely on her representations that she is not a surety.

Trinkle v. Ladoga Building, etc., Assn., 415, 424 (8).

7. *Notes.—Wife as Surety.—Liability.*—Generally, an obligor cannot plead suretyship as against the obligee unless the latter had notice of the fact of suretyship at the time of entering into the contract, but where the obligor is a married woman, one who contemplates loaning money to her is bound to make inquiry concerning the facts bearing on the question of suretyship.

Trinkle v. Ladoga Building, etc., Assn., 415, 423 (7).

8. *Support of Family.—Husband's Duty.*—A husband and father is under both a common-law and a statutory obligation to support his wife and children.

In re Carroll, 146, 156 (8).

IMPEACHMENT—

See WITNESSES 1.

IMPLIED TRUSTS—

See TRUSTS 8.

IMPUTED NEGLIGENCE—

See NEGLIGENCE 6.

INDEMNITY INSURANCE—

See INSURANCE 45-50.

INDEPENDENT CONTRACTORS—

See MASTER AND SERVANT 4-6, 25, 26, 59.

INDUSTRIAL BOARD—

Workman's compensation, see MASTER AND SERVANT 27-101.

INFERENCES—

From evidence, see APPEAL 58, 61, 66; EVIDENCE 5; MASTER AND SERVANT 70.

INJUNCTION—

1. *Complaint.—Right to Relief.*—One demanding the aid of a court must have some interest in the matter or controversy which he seeks to have litigated and determined, and, when the appeal is to equity for injunctive relief, facts and circumstances must be alleged showing more than a mere technical

INJUNCTION—Continued.

- and inconsequential wrong or irregularity in the proceedings sought to be enjoined. *Martin v. Board, etc.*, 375, 378 (3).
2. *Right to Relief.—Remedy at Law.—Statute.*—Under §9511 Burns 1914, Acts 1911 p. 185, providing that under the direction of the board of commissioners the county surveyor shall have charge of all county surveying and engineering work, including the preparation of plans and specifications for, and general supervision and construction of, all bridges, provided, that if the county surveyor is not a competent civil engineer, then the board shall appoint one to supervise the work ordered, but in such case the county surveyor shall have the right to a hearing as to his competency before the judge of the circuit or superior court of the county, the board's appointment of another than the county surveyor to prepare plans and specifications for a bridge and to supervise its construction was, in effect, a finding that the surveyor was incompetent, and his only remedy, in the absence of fraud or corruption, was a hearing as provided by the statute, and he could not enjoin the construction of the bridge on the ground that the proceedings were rendered void by the employment of another to act as engineer. *Martin v. Board, etc.*, 375, 379, 381 (4).

INSANE PERSONS—

See also DOMICIL.

1. *Adjudication of Insanity in Guardianship Proceedings.—Scope of Inquiry.—Conclusiveness of Judgment.*—An adjudication of unsoundness of mind, in a proceeding under §3101 *et seq.* Burns 1914, Acts 1895 p. 205, for the appointment of a guardian for a person of unsound mind, is not conclusive, as to the sanity of the person involved, in another proceeding in which is questioned his mental capacity in some respect other than the management of his own estate. *Hayward v. Hayward, Admr.*, 440, 467 (16).
2. *Adjudication of Insanity in Guardianship Proceeding.—Scope.—Conclusiveness.*—Where one mentally incompetent was removed by a relative from her legal domicile in Kentucky to Indiana, and subsequently, while residing in this state, she was adjudged of unsound mind and a guardian was appointed to manage her estate under the provisions of §3101 *et seq.* Burns 1914, Acts 1895 p. 205, the court's determination of the question of her inhabitancy in that proceeding was conclusive only for the purposes thereof, and was not an adjudication of domicile for the purpose of determining what laws govern the descent and distribution of her personal property. *Hayward v. Hayward, Admr.*, 440, 468 (18).
3. *Appointment of Guardian.—Interest of Public.*—A proceeding for the appointment of a guardian for an insane person is based on the theory that the public has an interest in their welfare and in the preservation of their property, and the public rather than the person instituting the proceeding is the real party in interest. *Hayward v. Hayward, Admr.*, 440, 467 (17).
4. *Appointment of Guardian.—Statute.—Scope.*—Section 3101 Burns 1914, Acts 1895 p. 205, governing proceedings to determine whether an "inhabitant" of the county is of unsound mind and incapable of managing his own estate, is broad enough to be applicable in a proceedings to determine the mental compe-

INSANE PERSONS—Continued.

tency of a person having property and an established business in this state, and living here under circumstances indicating a permanency of residence, although his legal domicile is in fact elsewhere. *Hayward v. Hayward, Admr.*, 440, 465 (14).

5. *Guardian. — Appointment. — Statute.* — Sections 3105, 3106 Burns 1914, §§2549, 2550 R. S. 1881, relating to the appointment of guardians for insane persons, apply to cases where the insane persons are outside the state or county, but property belonging to them is located therein.

Hayward v. Hayward, Admr., 440, 465 (15).

6. *Guardians. — Jurisdiction of Court. — Statutes.* — Primarily, in the absence of a statute, chancery courts have jurisdiction in matters affecting the welfare and the personal property and rights of the insane, but in this state such power is lodged by §3101 *et seq.* Burns 1914, Acts 1895 p. 205, in courts having probate jurisdiction, and where a guardian is appointed his powers and duties, as prescribed by §§3068, 3107 Burns 1914, §§2521, 2551 R. S. 1881, must be performed under the court's supervision.

Hayward v. Hayward, Admr., 440, 461 (11).

7. *Residence. — Acquisition.* — Where one mentally incompetent was removed by relatives from one state to another, and was maintained and cared for in the latter until her death, she acquired a residence there.

Hayward v. Hayward, Admr., 440, 450 (5).

INSTRUCTIONS—

See TRIAL 6-8.

Cure of error by, see APPEAL 82.

Review of, see APPEAL 21, 38, 44, 46, 55, 67, 71, 88; DAMAGES 2; DEATH 4; ESTOPPEL 6; INSURANCE 58, 59.

INSURANCE—

See also APPEAL 92; PRINCIPAL AND AGENT.

1. *Authority of Agent. — Construction.* — The written authority of an insurance agent is to be liberally and fairly construed, and a narrow and limited meaning is not to be given to it, unless the language employed clearly indicates that such was the intention of the parties.

Continental Ins. Co. v. Bair, 502, 523 (16).

2. *Contracts. — Construction.* — An insurance certificate should be construed as a whole, and, if possible, every part thereof given effect.

Farmers', etc., Assn. v. Mason, 66, 79 (6).

3. *Contract. — Construction.* — As insurance contracts are usually prepared by the insurer, the courts interpret them liberally in favor of the insured, so that the evident intention existing at the time the insurance was obtained may not be thwarted by a narrow or technical construction of the language employed.

Globe, etc., Ins. Co. v. Hamilton, 541, 546 (6).

4. *Classes of Creditors. — Right of Action by Receiver.* — Where the majority of the policy-holders of an insolvent insurance company were estopped by their knowledge of the transaction to recover money paid to the directors of the corporation in repayment of certain money advanced by them in an attempt to comply with statutory requirements relating to the organization of mutual fire insurance companies, the receiver of the

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corporation could not recover such repayments in behalf of policy-holders who did not receive notice of the transaction, since a receiver, as trustee for the creditors, may prosecute only those causes of which all the general creditors are beneficiaries, and interests peculiar to a class of creditors, from the benefits of which the general creditors are excluded, are not represented by a general receiver for purposes of vindicating rights based thereon by litigation. *Welliver, Rec., v. Coate*, 195, 219 (10).

5. *Insurance Company.—Debts of Company.—Money Borrowed from Officers.—Payment.—Action by Receiver to Recover.—Policy-Holders.—Estoppel.*—Where the promoters and incorporators of a fire insurance company advanced money to it in an attempt to comply with certain statutory requirements relating to the organization of such concerns, and later as directors of the company in good faith and in behalf of the corporation paid back a portion of the money in accordance with the agreement made when the loan was negotiated, the entire transaction being fair and free from fraud, the receiver of the company could not, in behalf of the policy-holders who were fully informed before taking out their policies as to the arrangement whereby the money was advanced and the conditions as to its repayment, recover the money repaid, as such policy-holders were estopped by their knowledge of the facts.

Welliver, Rec., v. Coate, 195, 217, 218 (7).

6. *Debts of Company.—Money Borrowed from Officers.—Payment.—Right of Receiver to Recover.*—Where the promoters and incorporators of a fire insurance company advanced it money, in an attempt to comply with certain statutory requirements relating to the organization of such concerns, on the condition that they were to be repaid when the financial condition of the company permitted, and the money was used for the legitimate purposes of the business, the receiver of the corporation, suing in its behalf, could not recover money later paid on the loan by such promoters acting as directors of the company on the ground that the persons receiving such payments were officers of the corporation, the transaction being fair, just and free from fraud.

Welliver, Rec., v. Coate, 195, 217 (6).

7. *Policy.—Construction.—“Addition.”*—The word “addition,” as applied to buildings, usually means a part added, or joined, to a main building, but in construing the term as used in insurance contracts, the use made of buildings more or less closely situated, their relative location, accessibility, and adaptability to some common end are factors which must be considered, and the designation “addition” may be applied to buildings appurtenant to some other building though not actually in physical contact therewith.

Globe, etc., Ins. Co. v. Hamilton, 541, 548 (7).

8. *Provisions of Policy.—Waiver.*—A stipulation in an insurance policy that none of its provisions can be waived by an agent except by the consent of the company indorsed on the policy may itself be waived either by express agreement or by conduct.

Continental Ins. Co. v. Bair, 502, 525 (17).

9. *Provision of Policy.—Waiver.—Indorsement of Mortgage.*—Where a fire insurance company, through its authorized agent,

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obtained knowledge of a mortgage on insured premises and agreed to place on the policy the requisite clause to make it payable to the mortgagee, but failed for seven months to so indorse the policy, the insurer waived the condition requiring its consent to be indicated in writing upon the policy.

Continental Ins. Co. v. Bair, 502, 525 (18).

10. *Accident Insurance.—Construction of Policy.—Exceptions.*—An accident insurance policy providing for indemnity in case of total disability resulting from accident, but in a subsequent clause limiting the insurer's liability to four weeks' indemnity "in the event of disability due to accident or illness, wholly or in part caused by or resulting directly or indirectly in or complicated with" neuritis, does not limit the company's liability for total disability indemnity, though during the same period neuritis developed from the injury, where it appears that insured was continuously and totally disabled by the original injury independent of any other cause.

American Liability Co. v. Bowman, 109, 122 (8).

11. *Accident Insurance.—Construction of Policy.—Total Disability.*—Provisions of an accident insurance policy for total disability indemnity should be liberally and fairly construed so as to give the insured the indemnity which he contracted to obtain, and at the same time to guard the company against fraud or imposition.

American Liability Co. v. Bowman, 109, 121 (7).

12. *Accident Insurance.—Construction of Policy.—Total Disability.—Refusal to Work.*—One insured under an accident insurance policy cannot recover for total disability where he failed or refused to work when he had an opportunity to do so, if he was at the time reasonably able to perform such work.

American Liability Co. v. Bowman, 109, 120 (6).

13. *Accident Insurance.—Construction of Policy.—Total Disability.—Attempt to Work.*—Where a party is shown to be in fact totally disabled for the entire period for which compensation is sought under an accident insurance policy, it cannot be said as a matter of law that he was not so disabled because during a portion of such time he made a good-faith, though ineffectual effort, to perform the duties of his usual employment.

American Liability Co. v. Bowman, 109, 120 (5).

14. *Accident Insurance.—Construction of Policy.—Total Disability.—Question of Fact.*—The phrase "total disability," as used in accident insurance policies, should be given a rational and practical construction, and is a relative term, depending in a measure upon the nature of the employment, the capabilities of the injured person, and the circumstances of each case, and is usually a question of fact to be determined by the court or jury.

American Liability Co. v. Bowman, 109, 120 (4).

15. *Accident Insurance.—Construction of Policy.—Attempt of Insured to Work.—Total Disability Benefits.*—Under an accident insurance policy providing for the payment of indemnity for total disability resulting from accidental causes during the period that the insured was totally and continuously from the date of the accident disabled and prevented from performing every duty pertaining to any business or occupation, as a necessary result of the injuries received, an injured workman may recover for total disability for the entire period he was, in fact, totally disabled, though during part of such period, a few days

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after his injury, he returned to work for a short time when his condition was such that he could perform only part of his duties and might reasonably have been warranted in not attempting to do any work, since a construction of the policy which would defeat a recovery because the insured made a good-faith effort to perform the duties of his usual employment would tend to encourage fraud against the company, and to discourage fairness and efforts to return to work as soon as possible after an injury.

American Liability Co. v. Bowman, 109, 119, 121 (3).

16. *Accident Insurance.—Construction of Policy.*—In construing insurance contracts, the courts give a fair and reasonable construction to the language employed, and in so doing consider the relation and situation of the parties when the contract was made, and from such considerations ascertain the meaning upon which the minds of the contracting parties may reasonably be said to have met.

American Liability Co. v. Bowman, 109, 118 (2).

17. *Accident Insurance.—Construction of Policy.*—Insurance contracts providing indemnity for disability or death of the insured which are prepared by the company and are ambiguous, or reasonably subject to conflicting interpretations, are strictly construed against the company and are given such reasonable and liberal construction as will effectuate the purpose of the parties and sustain the object of entering into the contract, where it can be done without doing violence to the language employed.

American Liability Co. v. Bowman, 109, 118 (1).

18. *Fire Insurance.—Organization of Company.—Right to do Business.—Statute.*—Section 4651 Burns 1914, Acts 1889 p. 346, providing that a fire insurance company is authorized to issue policies where it has applications for insurance in which there shall be taken not less than \$100,000 in *bona fide* premium notes and \$20,000 in cash by the company, contemplates that the latter sum shall be paid on applications for insurance and not advanced by the incorporators or any of them, under an arrangement whereby it was to be returned to them when the financial condition of the company permitted.

Welliver, Rec., v. Coate, 195, 209 (1).

19. *Fire Insurance Company.—Payment of Borrowed Money.—Recovery by Receiver.—Ultra Vires Acts.*—Where in a good-faith attempt to comply with §4651 Burns 1914, Acts 1889 p. 346, providing that a fire insurance company may issue policies when it has applications for insurance in which there shall be taken not less than \$100,000 in *bona fide* premium notes and \$20,000 in cash, the statute contemplating that the latter sum be paid by applicants for insurance, the promoters and incorporators of an insurance company, misinterpreting the statute, advanced the \$20,000, and the corporation received and used such sum for the legitimate purposes of the business, and later such incorporators, as directors of the company, in good faith and acting for the corporation paid back a portion of the money, the financial condition of the company being such at the time as to justify the belief that such payments could be made without impairing the corporation's liability to pay all losses that could reasonably be anticipated, the receiver of the company could not in its behalf recover the money so paid on

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the ground that the transaction was not within the powers of the corporation. *Welliver, Rec., v. Coate*, 195, 214 (4).

20. *Fire Insurance.—Action on Policy.—Evidence.—Admissibility.*—In an action to recover on a fire insurance policy covering premises used for degreasing garbage, evidence as to the process of degreasing and the use of gasoline therein was admissible as tending to show that the insurer had at least constructive knowledge of the use of gasoline on the premises, although its use was prohibited by a clause in the policy.

Insurance Co., etc. v. Indiana Reduction Co., 330, 338 (9).

21. *Fire Insurance Policy.—Action.—Evidence.*—In an action to recover on fire insurance policies, uncontradicted evidence showing the issuance of the policies and the payment of premiums thereon, the occurrence of a fire damaging the property insured in an amount in excess of the total amount of insurance and that verified proofs of loss furnished the insurer were not returned or objected to by it, is sufficient, standing alone, to entitle plaintiff to a recovery.

Insurance Co., etc. v. Indiana Reduction Co., 330, 334 (1).

22. *Fire Insurance.—Conditions Avoiding Policy.—Construction.*—A provision in a policy of insurance declaring it void, if a prohibited article is kept or used on the premises, merely means that it shall be voidable at the election of the insurer.

Insurance Co., etc. v. Indiana Reduction Co., 330, 335 (2).

23. *Fire Insurance.—Conditions Avoiding Policy.—Waiver.*—Where the insurer has no knowledge that a prohibited article is being kept or used on the insured premises at the time of the issuance of the policy, but subsequently discovers such fact, it must tender back the premium received within a reasonable time thereafter, and, upon its failure to do so, it will be deemed to have waived the right to declare the policy void; and this rule is applicable even where the keeping and using of a prohibited article is not discovered until after a loss has occurred.

Insurance Co., etc. v. Indiana Reduction Co., 330, 336 (4).

24. *Fire Insurance.—Conditions Avoiding Policy.—Waiver.*—Where an article, the keeping of which on the premises insured is prohibited by the policy, is kept and used on the premises at the time of the issuance of the policy and acceptance of the premium therefor, and the insurer knows that fact at the time, it waives the right to avoid the policy because of the prohibited act. *Insurance Co., etc. v. Indiana Reduction Co.*, 330, 335 (3).

25. *Fire Insurance.—Insurance Brokers.—Knowledge.*—An insurance broker, acting within the scope of his authority, is the agent of the company from which he secures insurance, and his knowledge relating to the risk is binding on the company, though not communicated to it.

Insurance Co., etc. v. Indiana Reduction Co., 330, 337 (6).

26. *Fire Insurance.—Knowledge of General Agent.*—An insurance company is chargeable with any knowledge possessed by its general agent as to facts material to the risk.

Insurance Co., etc. v. Indiana Reduction Co., 330, 336 (5).

27. *Fire Insurance Policy.—Action.—Directing Verdict.*—In an action on a fire insurance policy containing a provision prohibiting the keeping or using of gasoline in the insured premises, where the undisputed evidence showed that the broker

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writing the insurance knew that at the time the policies were issued, and continuously thereafter, large quantities of gasoline were stored on the premises and used by insured in the conduct of its business, that the premiums were paid, that, after damage by fire, insured furnished the insurer proofs of loss which were retained without objection, that the company's general agent, shortly after the fire, learned of the use of gasoline on the premises, and that the insurer failed to return, or to offer to return, the premiums received, the direction of a verdict for plaintiff was proper; and the fact that the agency of the broker was controverted was immaterial in view of the knowledge of the prohibited acts possessed by the company's general agent.

Insurance Co., etc. v. Indiana Reduction Co., 330, 337 (7).

28. *Fire Insurance.—Provisions of Policy.—Waiver.*—Provisions of a fire insurance policy rendering it void if the property insured should be encumbered without the written consent of the company indorsed on the policy, that no agent has authority to waive any condition of the policy except as therein stated, and that no waiver is binding on the company unless written upon, or attached to, the policy, are stipulations in favor of the company, which it could waive by express agreement or by conduct.

Continental Ins. Co. v. Bair, 502, 531 (24).

29. *Fire Insurance.—Provisions of Policy.—Waiver.—Indorsement of Mortgage.*—Provisions in a policy of fire insurance rendering it void if the property insured should be encumbered without the written consent of the company indorsed on the policy, and that no stipulation of the policy can be waived except by written indorsement thereon, are waived where the company's agent, acting within the scope of his authority, agreed to indorse on the policy the insurer's consent to a mortgage of the insured property.

Continental Ins. Co. v. Bair, 502, 532 (25).

30. *Fire Insurance.—Policy.—Construction.*—Where a policy of fire insurance was written by a local agent, and by special arrangement was kept in the agent's office and was not seen by insured until after loss by fire, the contract was not to be construed with the same strictness generally obtaining in the interpretation of written instruments where the parties have like opportunity to be advised as to their provisions.

Continental Ins. Co. v. Bair, 502, 527 (20).

31. *Fire Insurance Policy.—Presumption Against Forfeiture.*—Where the premium has been paid on a policy of fire insurance and the risk has attached, every presumption will be indulged in favor of the good faith of the parties and to avoid a forfeiture.

Continental Ins. Co. v. Bair, 502, 527 (21).

32. *Fire Insurance.—Proofs of Loss.—Objections.—Sufficiency.—Statute.*—Section 4622g Burns 1914, Acts 1911 p. 525, providing that, when a fire insurance policy requires the making of a preliminary proof of loss, the insured shall furnish such proofs within sixty days, and, if the proofs furnished are objected to by the insurer as being defective, they shall be returned to insured with a specification of defects claimed, in which case he shall remedy the objections by amendment or make affidavit that he is unable to do so, contemplates a good-faith claim that the preliminary proofs are defective and a definite statement of omitted facts in the notice of defects in

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such proof, which requirements are not met by objections to proofs of loss that they are defective because failing to furnish a detailed schedule of claim, to state if any other person had any interest in the property, to state knowledge and belief as to the time and origin of the fire, and because encumbrances had been placed on the property without the insurer's knowledge and consent, where insured had given the insurer notice of the encumbrance on the property, and, within sixty days after a fire, had made proof that the house insured had been totally destroyed on a certain date, that the damage amounted to a sum named, that he owned the property in fee simple encumbered by a mortgage, and stating the name of each mortgagee and the amount of their respective claims.

Continental Ins. Co. v. Bair, 502, 521 (12).

33. *Fire Insurance.—Proofs of Loss.—Sufficiency.—Statute.*—Proofs of loss furnished within sixty days after the fire showing that the house insured was totally destroyed on a certain date, that the loss amounted to a sum named, that insured owned the property in fee simple, and that it was encumbered by a mortgage, the name of each mortgagee and the amount of their respective claims being set out, furnished a detailed schedule of the claim, stated the character and extent of the interest of other parties, gave full information as to the encumbrance, thereby substantially complying with the terms of the policy and the requirements of §4622g Burns 1914, Acts 1911 p. 525, as to proofs of loss.

Continental Ins. Co. v. Bair, 502, 520 (11).

34. *Fire Insurance.—Contract.—Proof of Loss.—Necessity.—Statute.*—Under §4622g Burns 1914, Acts 1911 p. 525, providing that, when a policy of fire insurance requires preliminary proofs of loss, they shall be furnished by the insured within sixty days, and, if objected to by the insurer as defective, they shall be returned, together with a specification of defects, within ten days, in which case the insured is allowed ten days to remedy the objections or make affidavit that he is unable to do so, where the proofs of loss submitted by insured could not be made more definite and specific, and where before the expiration of the ten-day period following their return to insured with objections thereto, and before service of formal notice of rescission, the insurer informed the insured that it denied all liability under the policy, and also stated that its position as regards liability could not be changed by any modification of proofs, insured was not required to make any further proofs.

Continental Ins. Co. v. Bair, 502, 520 (10).

35. *Fire Insurance.—Insufficient Proofs of Loss.—Failure to Furnish Affidavit.*—Under §4622g Burns 1914, Acts 1911 p. 525, relating to proofs of loss by fire, the failure of insured to submit an affidavit showing that proofs of loss returned as defective could not be made more specific, within ten days from the receipt of the insurer's objection thereto, was the omission of only a technical detail, where the proofs furnished, fairly construed, supplied all the information called for, and were not subject to the objections made.

Continental Ins. Co. v. Bair, 502, 521 (13).

36. *Fire Insurance.—Authority of Agent.—Scope.—Indorsement of Mortgage.*—The written authority of the local agent of a

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fire insurance company empowering him to effect insurance, to countersign, issue, and renew policies, to consent in writing to their assignment and transfer, and to collect premiums, authorized him to consent to the encumbrance by mortgage of insured property, and to indorse the consent of the insurer thereto on the policy, so that the agent's agreement to make such indorsement was binding on the insurer.

Continental Ins. Co. v. Bair, 502, 522, 523, 530 (14).

37. *Fire Insurance.—Mortgage.—Indorsement of Policy.*—The authorization of payment of a fire insurance policy to a mortgagee is a conditional assignment or transfer to the mortgagee of an interest in the policy.

Continental Ins. Co. v. Bair, 502, 523 (15).

38. *Fire Insurance.—Indorsement of Policy.—Equitable Relief.*—Where the holder of a fire insurance policy notified the insurer of the execution of a mortgage on the premises insured and obtained the insurer's agreement to indorse the interests of the mortgagees upon the policy, as required by its provisions, on the insurer's failure to comply with its agreement equity will regard that as done which in good conscience ought to have been done.

Continental Ins. Co. v. Bair, 502, 512 (4).

39. *Fire Policy.—Action.—Complaint.—Sufficiency.—Proof of Loss.*—In an action on a policy of fire insurance, a complaint alleging that due proof of loss was furnished the insurer within thirty-nine days of the fire and within sixty days allowed by §4622g Burns 1914, Acts 1911 p. 525, and the provisions of the policy, sufficiently shows as against demurrer that the proof of loss was made as required by the policy and statute.

Continental Ins. Co. v. Bair, 502, 514 (5).

40. *Fire Insurance.—Action on Policy.—Mortgagees.—Insurable Interest.*—Where the interest of mortgagees in a house covered by a fire insurance policy, although not in fact indorsed on the policy, was regarded by equity as having been so indorsed, the mortgagees had an insurable interest in the insured premises and could maintain an action against the insurer to recover for loss by fire.

Continental Ins. Co. v. Bair, 502, 515 (6).

41. *Fire Insurance Policy.—Construction.—Condition against Encumbrances.*—A provision in a fire insurance policy that it shall be null and void if the property should become mortgaged or encumbered, relates to liens voluntarily placed on the property by the insured, and does not apply to judgments thereafter obtained against him or other liens created by law, such as a money judgment in a suit for divorce.

Continental Ins. Co. v. Bair, 502, 516 (7).

42. *Fire Insurance.—Action on Policy.—Necessary Parties.—Plaintiffs.—Statutes.*—Under §§251, 263 Burns 1914, §§251, 262 R. S. 1881, all who join as plaintiffs must have an interest in the subject of the action, and be united in such interest, although the interest of the several parties joined need not be equal and may be severable, provided all have some common interest in the subject-matter of the action, and this rule applies in cases involving loss by fire where the owner of the property insured and the holder of an encumbrance thereon are joined in a suit against the insurance company on the policy, it appearing that the total loss exceeds the amount of the encumbrance.

Continental Ins. Co. v. Bair, 502, 510 (2).

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43. *Fire Insurance.—Policy.—Construction.—Property Covered.—Addition.*—Where a fire policy insured household furniture "while contained in the one and one-half-story frame, with shingle roof, dwelling house and additions," it covered furniture stored in an outbuilding situated on the rear of the lot and connected with the house by a cement walk, the word "additions," as used in the policy, meaning any and all buildings on the premises used by the insured in maintaining his home by storing or using his furniture and household effects therein.
Globe, etc., Ins. Co. v. Hamilton, 541, 549 (8).
44. *Fire Insurance.—Knowledge of Agent.—Imputation to Company.*—One who acts for an insurance company in procuring insurance, collecting premiums, inspecting risks, etc., is its agent, and his acts and knowledge relating to property insured at the time a policy is executed are imputed to the company.
Globe, etc., Ins. Co. v. Hamilton, 541, 545 (2).
45. *Indemnity Insurance.—Policy.—Construction.—Duty of Insurer.*—Under an insurance policy indemnifying assured against loss from liability resulting from loss of life or personal injury, not exceeding \$5,000 for the loss of life or injury to any one person, providing that, if suit is brought on account of accident covered by the policy, the company will at its own cost defend such suit, unless it shall elect to settle or pay the assured the indemnity provided by the policy, where suit has been brought the insurer is not obligated to accept an offer of settlement for less than the face of the policy, but it may elect between settlement, defense of the action, or payment of the stipulated indemnity.
Kingan & Co. v. Maryland Casualty Co., 301, 311 (1).
46. *Indemnity Insurance.—Policy.—Construction.—Liability of Insurer.—Extent.*—Under an insurance policy indemnifying assured against loss from liability resulting from loss of life or personal injury, not exceeding \$5,000 for the loss of life or injury to any one person, providing that, if suit is brought against assured on account of accident covered by the policy, the insurer will at its own cost defend the action, unless it shall elect to settle or pay the assured the stipulated indemnity, the insurer, by electing to defend the suit of a person injured, rather than to settle, did not assume the full risk of the litigation, but was obligated to indemnify the assured only to the extent of the primary indemnity specified by the policy and for such costs as counsel and witness fees, court costs, etc., although the judgment recovered was in excess of the stipulated indemnity.
Kingan & Co. v. Maryland Casualty Co., 301, 313 (2).
47. *Indemnity Insurance.—Policy.—Construction.—Liability for Interest on Judgment.*—Where an insurance policy indemnifies against loss or damage, but not against liability, the insurer is not chargeable with interest on a judgment against the assured until the latter has suffered loss by paying the judgment, and submitting the proofs required by the provisions of the policy.
Kingan & Co. v. Maryland Casualty Co., 301, 315 (3).
48. *Indemnity Insurance.—Policy.—Construction.—Insurer's Liability for Interest on Judgment.*—A liability policy indemnifying assured against all immediate loss or damage from liability resulting from loss of life or injury to person, provides indemnity against loss or damage and not against liability, so that

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where insured paid a judgment covered by the policy, the insurer's liability for interest thereon dated from the time of payment only.

Kingan & Co. v. Maryland Casualty Co., 301, 316 (5).

49. *Indemnity Insurance.—Policy.—Construction.—Acts of Assured.*—The fact that insured apparently recognized that his policy indemnified him only against loss or damage, and not against liability, by paying a judgment covered by the policy before making a demand on the insurer, and by furnishing proofs of payment in accordance with the terms of the policy, should not be held to conclude insured, since such recognition may have been based on prudential reasons.

Kingan & Co. v. Maryland Casualty Co., 301, 316 (4).

50. *Indemnity Insurance.—Action on Policy.—Tender.—Burden of Proof.*—In an action by the insured against the insurer on a liability insurance policy where defendant pleaded tender, the burden was on defendant to establish the facts constituting the tender. *Kingan & Co. v. Maryland Casualty Co.*, 301, 319 (6).

51. *Forfeiture for Nonpayment of Premiums.—Estoppel.*—An insurer will be estopped to insist upon a forfeiture, if, by an agreement, either expressed or implied by the course of its conduct, it leads the insured to believe that his premiums will be received after the appointed day.

Farmers', etc., Assn. v. Mason, 66, 88 (14).

52. *Forfeiture.—Waiver.—Definition.*—Waiver is where one in possession of any right, whether conferred by law or by contract, and with full knowledge of material facts, does or forbears the doing of something inconsistent with the existence of the right or his intention to rely upon it.

Farmers', etc., Assn. v. Mason, 66, 86 (12).

53. *Policy.—Forfeiture Clauses.—Construction.*—Though forfeitures are not favored by the law, courts must enforce them when the party by whose fault they are incurred cannot show some good ground in the conduct of the other party on which to base a reasonable excuse for the default.

Farmers', etc., Assn. v. Mason, 66, 91 (16).

54. *Life Insurance.—Forfeiture for Nonpayment of Premiums.—Estoppel.*—An insurer is not estopped from asserting a forfeiture, as provided in the policy, for nonpayment of premiums because commissions earned by insured in selling insurance had at times been applied on premiums due from him, and because he had been reinstated on payment of delinquent premiums, where no premiums had been paid in commissions during the last fifteen months preceding the death of the insured, and he had been required to furnish a certificate of good health on several occasions as a condition precedent to reinstatement after failure to pay premiums when due.

Farmers', etc., Assn. v. Mason, 66, 88, 91 (13).

55. *Life Insurance.—Accepting Delinquent Premiums.—Waiver.*—An insurer's occasional voluntary indulgence in accepting delinquent premiums, in the absence of an express or implied agreement to waive payment of assessments according to the conditions of the contract, cannot be construed as a permanent waiver, or as depriving the company of the right to insist upon

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a forfeiture, or to cancel its policy on account of the failure to pay according to the stipulations therein.

Farmers', etc., Assn. v. Mason, 66, 90 (15).

56. *Life Insurance.—Policy Provisions.—Waiver.—Evidence.—Admissibility.*—In an action on a life insurance policy, which required, as a condition precedent to reinstatement when a policy had lapsed for nonpayment of premiums, that insured should furnish a satisfactory certificate of good health, where the jury was required to determine whether the policy had been reinstated by the insurer's acceptance of a note for delinquent premiums for a period up to a certain date, a postal card from the insurer to the insured notifying him that another premium, payable in advance, was due on such date was admissible on the question of whether the requirement as to the certificate of good health had been waived by the insurer, there being no evidence that such certificate had been furnished.

Farmers', etc., Assn. v. Mason, 66, 92 (17).

57. *Life Insurance.—Evidence.—Receipts of Premium Payments.—Admissibility.*—In an action to recover on a life insurance policy, receipts executed by the insurer showing the payment of premiums by insured are admissible as tending to show that insured had performed his part of the contract.

Farmers', etc., Assn. v. Mason, 66, 92 (18).

58. *Life Insurance.—Action on Policy.—Instructions.—Ignoring Evidence.—Nonpayment of Premiums.*—In an action on a certificate of insurance, an instruction that, if insured executed a note in payment of all premiums up to specified date, and the insurer accepted such note as payment, the insured might recover, was erroneous as ignoring the fact that under the provisions of the certificate it might lapse if the note was not paid.

Farmers', etc., Assn. v. Mason, 66, 92 (19).

59. *Life Insurance.—Action on Policy.—Instructions.*—In an action on an insurance certificate, an instruction that the insured's acceptance of a note for delinquent premiums kept the certificate in full force up to a specified date, and that insured could keep it alive by paying the premium due immediately after such date, was erroneous as ignoring the possibility that under the provisions of the certificate it might lapse upon nonpayment of the note.

Farmers', etc., Assn. v. Mason, 66, 93 (20).

60. *Life Insurance.—Premiums.—Payment by Note.*—The payment of an insurance premium by note may be either absolute or conditional, depending on the intention of the parties at the time of the execution of the note, and the intention may be expressed in the policy, or in the note itself.

Farmers', etc., Assn. v. Mason, 66, 74 (1).

61. *Life Insurance.—Forfeitures.—Nonpayment of Premium.*—The fact that an insurer sometimes applied commissions due from it to the insured for premiums owed by him is not sufficient evidence that it waived the forfeiture provided by the terms of the policy for nonpayment of premiums as regards premiums due and unpaid at a time when insured had no commissions to his credit, since the insurer was under no obligation to await the accumulation of commissions which could be applied to the payment of delinquent premiums.

Farmers', etc., Assn. v. Mason, 66, 84, 86 (11).

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62. *Forfeitures.—Payment of Premiums.—Waiver.*—A provision in an insurance certificate for forfeiture for nonpayment of a premium or a premium note, being for the benefit of the insurer, may be waived by it.
Farmers', etc., Assn. v. Mason, 66, 82 (10).
63. *Life Insurance.—Forfeitures.—Retention of Unpaid Premium Note.*—An insurance company did not waive a provision forfeiting the policy for nonpayment of premiums by merely retaining an unpaid note given for premiums, where the insurer made no effort to collect the note, or to assert it, as an obligation against the insured or his estate, and refused to accept payment from the beneficiary after the death of the insured.
Farmers', etc., Assn. v. Mason, 66, 81, 83 (9).
64. *Life Insurance.—Policy.—By-Laws.—Construction.*—Whether an insurance association's by-law as to the lapsing of an insurance certificate is unenforceable as being too indefinite is immaterial, where the situation is definitely covered by a provision in the certificate itself.
Farmers', etc., Assn. v. Mason, 66, 80 (8).
65. *Life Insurance.—Policy.—Construction.—Forfeitures.*—A provision in a certificate of insurance that the certificate should be incontestable after two years, except for nonpayment of premiums, is not in conflict with a forfeiture clause providing for the lapsing of a certificate where a note given in payment of a premium is not paid, as the provisions, when construed together, mean that the certificate may be contested after two years for the nonpayment of premiums or notes given therefor.
Farmers', etc., Assn. v. Mason, 66, 80 (7).
66. *Life Insurance.—Premiums.—Payment by Note.—Policy Provisions.—Scope and Effect.*—Provisions in a policy of insurance in reference to the payment of premiums by note need not be incorporated in the note to make such provisions effective.
Farmers', etc., Assn. v. Mason, 66, 77 (4).
67. *Life Insurance.—Payment by Note.—Effect.*—A nonnegotiable note given for insurance premiums was merely a conditional, and not an absolute, payment, where a provision in the insurance certificate designated payment by note as an attempted payment, the insurer's receipt was given for the note and not for the premium, and there was no evidence of an agreement that the note was to be accepted as absolute payment of the premiums for which it was given.
Farmers', etc., Assn. v. Mason, 66, 74, 75 (2).
68. *Life Insurance.—Forfeitures.—Payment of Premiums by Notes.*—An insurance certificate providing that it shall be incontestable after two years, except for the nonpayment of premiums, may be contested after such period on the ground that a note given for premiums past due was not paid, where the note was not accepted as absolute payment, but merely operated to extend the time for payment, so that failure to pay the note was failure to pay the premiums for which it was given.
Farmers', etc., Assn. v. Mason, 66, 78 (5).

INTENT—

See CONTRACTS; DEDICATION; DOMICIL 7, 8; FIXTURES 1, 3; INSURANCE 1, 3; TRUSTS; WILLS 3.

INTERLOCUTORY ORDERS—

Appeal from, jurisdiction, see **COURTS 2.**

INTERROGATORIES—

See **APPEAL 54, 62.**

JUDGMENT—

See also **COURTS.**

For judgments in particular actions, see also the specific topics.

Presumptions favoring, see **APPEAL 53, 79.**

Final, right of appeal, see **APPEAL 1.**

When taken through mistake, etc., relief from, see **DISMISSAL AND NONSUIT.**

Review of, see **APPEAL.**

1. *Conclusiveness.*—In an action to quiet title to lands devised by will, plaintiffs were bound neither by a decree in an action to construe certain items of the will, where the decree stipulated that it should not be conclusive, nor by the judgment in a proceeding to construe another item wherein certain defendants, although parties in interest to such proceedings, were not made parties thereto. *Busick v. Busick*, 655, 676 (11).
2. *Conclusiveness.*—*Residence.*—*Collateral Attack.*—Where a court, with power to act in the general subject-matter involved, determines a jurisdictional question of residence in a proceeding to appoint a guardian, or administrator, the determination of the court for the purposes of executing the involved trust and transacting the business thereof is conclusive against collateral attack. *Hayward v. Hayward, Admr.*, 440, 464 (13).
3. *Erroneous Judgment.*—*Collateral Attack.*—Where a question is once litigated by the parties, the judgment rendered, though erroneous, cannot be amended or impaired in a collateral attack. *Hedges v. Mehring*, 586, 599 (8).
4. *Conclusiveness.*—*Collateral Attack.*—Where the holder of a note brought action thereon in which an indorser primarily liable as surety and indorsers in due course of business after negotiation were made defendants, and, the issue of suretyship having been presented by cross-complaint filed by the indorsers in due course of business, the trial proceeded on the theory of determining the rights of the defendants as between themselves, and a judgment, from which no appeal was taken, was rendered against all of them without distinction, the indorsers secondarily liable could not, in a subsequent action by the indorser as surety to enforce contribution after she had paid the judgment, deny liability. *Hedges v. Mehring*, 586, 600 (10).
5. *Final Judgment.*—A final judgment is one that disposes of all the issues, as to all the parties, presented by the pleadings, to the full extent of the power of the court to dispose of the same, and terminates the case as to all of such parties and issues. *Lake Mich. Water Co. v. U. S. Fidelity, etc., Co.*, 141, 143 (1).
6. *Issues.*—*Conclusiveness.*—*Presumptions.*—Everything which might have been determined under the issues in a case will be presumed to have been adjudicated. *Hedges v. Mehring*, 586, 598 (7).
7. *Joint.*—*Conclusiveness.*—*Parties to Note.*—In a suit on a note against several defendants alleged to be liable to plaintiff, in

JUDGMENT—Continued.

the absence of issues formed between such defendants, a joint judgment in favor of the plaintiff against all defendants is conclusive only as to their joint liability to plaintiff, and leaves unadjudicated their rights as between themselves.

Hedges v. Mehring, 586, 594 (1).

JUDICIAL KNOWLEDGE—

See EVIDENCE 6, 7.

JURISDICTION—

See COURTS; INSANE PERSONS 6; JUDGMENT 2.

Parties, on appeal, see APPEAL 5-10.

KNOWLEDGE—

Of agent, effect on principal, see INSURANCE 25, 26, 44.

LABOR—

See MASTER AND SERVANT.

LACHES

See ESTOPPEL.

LAW OF THE CASE—

See APPEAL 92.

LIFE ESTATE—

Limitation over, vesting, see WILLS 9.

LIMITATION OF ACTIONS—

1. *Statute.—Operation.*—Where a cause of action on a note and mortgage had been barred by the statute of limitations before the enactment of §§308a, 308b Burns 1914, Acts 1909 p. 334, limiting the time within which suit may be brought to foreclose to twenty years, the passage of such sections cannot renew or give new life to the cause of action.

Tennant v. Hulet, 24, 37 (4).

2. *Bar of Debt.—Effect on Security.—Statutes.*—The provisions of §§308a, 308b Burns 1914, Acts 1909 p. 334, that no action shall be brought or maintained to foreclose or enforce the lien of any mortgage on real estate when the last installment of the debt secured by such mortgage, as shown by the record thereof, has been due more than twenty years, and that the lien of all such mortgages shall cease and expire twenty years from such time, or, if the record does not show when the debt secured becomes due, then no action shall be brought after twenty years from the date of the mortgage, and the lien of such mortgage shall cease and expire twenty years from such date, do not show an intention on the part of the legislature to extend the time when an action may be brought to foreclose a mortgage which is given merely to secure a debt beyond the time when an action can be brought on the debt thus secured, but such statute was intended to be one of repose, limiting the remedy of the mortgagee.

Tennant v. Hulet, 24, 35 (3).

3. *Foreclosure of Mortgage.—Effect of Bar.*—A mortgage given for the sole purpose of securing the payment of a debt is but

LIMITATION OF ACTIONS—Continued.

an incident to the debt which it secures, and when the debt has been barred, by statute of limitations or otherwise, the mortgage lien ceases to be effective. *Tenant v. Hulet*, 24, 31 (1).

4. *Notes and Mortgages.—Action.—When Barred.—Statutes.*—Section 295, cl. 5, Burns 1914, §38 Acts 1881 [s. s.] p. 240, providing that actions upon promissory notes, bills of exchange, or other written contracts for the payment of money shall be commenced within ten years is controlling in an action on a note and mortgage, although the promise to pay is incorporated in the mortgage, the mortgage being merely an incident of the debt. *Tenant v. Hulet*, 24, 34 (2).

LIVE STOCK—

Shipment of, injuries, liability, see CARRIERS 7-12.

MARRIAGE—

See HUSBAND AND WIFE.

1. *Common-Law Marriage.—Contract.—Evidence.*—In order to consummate a valid common-law marriage, the conduct of the parties must be such as to show an intention to contract marriage and assume the relation of husband and wife, and such a marriage must appear either by the signature of the parties, where the contract is in writing, or by witnesses present when the agreement was made, and, in the absence of such evidence, the relationship may be proved by cohabitation, reputation, conduct, and the acts of the parties with respect to the marriage relation. *Meehan v. Edward Valve, etc., Co.*, 342, 344 (3).
2. *Common-Law Marriage.—Evidence.—Presumptions.*—To raise a presumption of common-law marriage, the evidence must be clear and convincing, and where there is evidence to negative such a presumption, it must fail.
Meehan v. Edward Valve, etc., Co., 342, 344 (2).
3. *Common-Law Marriage.—Evidence.—Cohabitation.*—Cohabitation does not of itself constitute a common-law marriage, but is merely evidence of marriage, and, if the cohabitation was originally illicit, it is presumed to have so continued.
Meehan v. Edward Valve, etc., Co., 342, 344 (4).
4. *Common-Law Marriage.—Evidence.*—In a proceeding under the Workmen's Compensation Act, Acts 1915 p. 392, for compensation for the death of a servant, where applicant testified that she had entered into a verbal common-law marriage contract with deceased and that thereafter they lived together for a considerable period of time, but there was also evidence that on one occasion she asserted that she was married to another, that deceased stated that they were not married and during the time they lived together decedent had an undivorced wife living, the evidence is sufficient to warrant a finding that applicant was not married to deceased, especially as §8360 Burns 1914, §5325 R. S. 1881, makes a marriage absolutely void if either party has a wife or husband living at the time of its consummation.
Meehan v. Edward Valve, etc., Co., 342, 345 (5).
5. *Common-Law Marriage.—Validity.—Requisites.*—Although common-law marriages are in derogation of statute, they are recognized as valid and binding where made between parties

MARRIAGE—Continued.

of contracting capacity by their mutual assent, followed by cohabitation as husband and wife, together with other circumstances essential to the establishment of such a marriage.

Meehan v. Edward Valve, etc., Co., 342, 343 (1).

MASTER AND SERVANT.

I. THE RELATION—CONTRACTS, 1-5.
II. MASTER'S DUTY—NEGLIGENCE—LIABILITY, 6-26.

III. WORKMEN'S COMPENSATION, 27-101.

I. THE RELATION—CONTRACTS.

See also **CONTRACTS 4.**

1. *Relation of Parties.—Undisputed Questions of Fact.—Province of Court.*—Where the facts relating to the employment of a servant are undisputed, the question as to who is the employer is a proposition of law to be declared by the court.
Looney v. Prest-O-Lite Co., 617, 622 (2).
2. *Contract to Employ Servant.—Action for Breach.—Complaint.—Sufficiency.*—In an action for breach of a contract of employment, a complaint alleging that plaintiff, while in the employment of defendants, was injured, that defendants, by their agent, in consideration of a written release executed by the employe, promised to pay plaintiff a stipulated sum of money and give him employment at the same wages he was receiving at the time of the injury, but failed to re-employ him though frequently requested to do so, and that plaintiff has been unable to obtain similar work, is sufficient as against demurrer for insufficiency of facts.
Carter v. Richart, 255, 260 (1).
3. *Contract of Employment.—Action for Breach.—Instructions.*—In an action for breach of a contract of employment, given as part consideration for a release from claims for personal injuries, instructions that where one holds a contract to perform service and the other party wrongfully refuses to permit the services to be performed, it is the duty of the one who is to perform the services to seek similar employment elsewhere and thereby save himself harmless, if he is able to do so, and for a violation of such a contract, if he is unable to secure other employment during the term, the measure of damages is the wages stipulated during such period, but, if the injured party has been able to secure employment, the damages are the diminution between the wages agreed upon under the contract and those received in the new employment, that the jury should consider, in assessing damages, the kind of work at which the injured party had been engaged, and when, if at all, he has been able to perform the work he had been engaged in since the injury, and any compensation received from other employment, and assess the recovery at any amount, not to exceed the sum demanded, as will fully compensate plaintiff, are proper.
Carter v. Richart, 255, 266 (10).
4. *Relationship.—Independent Contractor.*—In determining whether the relation between the employer and the injured party is that of master and servant, employer and employe, or that of contractor and contractee, the controlling test is the right of control over the means, methods and manner of performing the work, and if the employer retains such right, he

MASTER AND SERVANT—Continued.

thereby creates the relation of employer and employe, but if the person employed is permitted to choose for himself the method and manner of doing the work and is permitted to select the persons to do it, free from the control of his employer, except as to the product or result of the work, he is an independent contractor. *Zeitlow v. Smock*, 643, 652 (9).

5. *Relation of Parties.—Employes of Independent Contractor.*—Where the owner of a building which is being erected by a general contractor engages another contractor to install the heating apparatus and plumbing, and such contractor subcontracts with another to install the plumbing, a workman employed by such subcontractor is the servant of an independent contractor and not of the owner.

Looney v. Prest-O-Lite Co., 617, 622 (1).

II. MASTER'S DUTY—NEGLIGENCE—LIABILITY.

6. *Independent Contractors.—Injury to Servant.—Liability.—Res Ipsa Loquitur.*—Where a landowner engaged an independent contractor to erect, during freezing weather, a reinforced concrete building according to approved plans prepared by a competent architect, and an independent contractor to install the heating apparatus and the plumbing, and the latter subcontracted with another to install the plumbing, an employe of such subcontractor injured in a collapse of the building could not, in an action against the owner, recover on the theory of *res ipsa loquitur* merely because of the fall of the structure, and, in the absence of proof that the erection of a concrete building during freezing weather was necessarily or inherently dangerous, or that the collapse of the building resulted from some affirmative act or negligence of the owner, the defense that the work was being done by an independent contractor was available. *Looney v. Prest-O-Lite Co.*, 617, 624 (6).

7. *Duty of Master.—Safe Place to Work.*—It is the duty of the employer to furnish to the employe a safe place within which to work, and to provide him with proper tools and equipment, a duty which includes that of making reasonable inspection and repairs and of bringing to the knowledge of the employe the existence of defects and dangers of which the employer has knowledge, actual or constructive, but which are not known to the employe, and with knowledge of which he is not chargeable, and the master's failure to discharge such duties with reasonable care is negligence. *Free v. Home Telephone Co.*, 9, 15 (2).

8. *Employer's Liability Act.—Negligence.*—Negligence is the gist of all actions that may be maintained under the Employers' Liability Act (§8020a *et seq.* Burns 1914, Acts 1911 p. 145).

Free v. Home Telephone Co., 9, 21 (8).

9. *Injuries to Servant.—Employer's Liability Act.—Scope.—Coal Mines.*—An action may be maintained under the Employer's Liability Act (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), for personal injuries sustained in coal mines.

Peacock Coal, etc., v. Crawford, 401, 405 (5).

10. *Injuries to Servant.—Negligence.—Place of Work.—Failure to Inspect.*—Actionable negligence in an employer cannot be predicated on the mere failure to inspect the place of work,

MASTER AND SERVANT—Continued.

when inspection would disclose only what was fully known and appreciated by the servant.

Free v. Home Telephone Co., 9, 16 (3).

11. *Injuries to Servant.—Duty to Warn and Instruct Servant.*—A master may be liable to a servant injured while making repairs, demolishing structures, or similar work, under the supervision and direction of a foreman or other person representing the master, or where the master withholds from the servant information respecting defects and hazards with a knowledge of which the servant is not chargeable.

Free v. Home Telephone Co., 9, 19 (6).

12. *Injuries to Servant.—Perils Incident to Service.—Liability of Master.*—Where a competent person is employed to repair defects, or to demolish structures, and the perils of the service and the injury for which recovery is sought were occasioned by the nature of the work being done and which the servant was employed to do, such perils are deemed incident to the service, and there can be no recovery, since the employe assumes the risk.

Free v. Home Telephone Co., 9, 17 (5).

13. *Injuries to Employee.—Injuries Aggravating Disease.*—Where one is injured through the negligence of another, the fact that the former is predisposed to some disease and the injury materially aggravates or incites the disease and accelerates it to the stage of disability or to a fatal termination, and the forces which contribute, each materially, to produce such disability or death, are the disease and its aggravation or acceleration by the injury, the person injured or his representative has his remedy at common law.

In re Bowers et al., 123, 133 (5).

14. *Injuries to Servant.—Master's Liability.*—Where the manager of a telephone company and overseer of its lines engaged in dismantling a telephone line under the company's orders was injured when a pole which he had climbed broke off at the ground because of its rotten condition, the company was not liable, since it was the duty of the servant, who was experienced in the work and in full charge thereof, to test any pole before he ascended it and determine its safety for himself.

Free v. Home Telephone Co., 9, 20 (7).

15. *Injuries to Servant.—Safe Place to Work.—Duty of Master.*—The duty of a master to furnish a reasonably safe place to work and to use ordinary care to keep it safe, is a qualified one, and does not extend to all the passing risks that may arise from short-lived causes, such as arise in the ever-changing conditions of the safety of the work, or under circumstances imposing on the employe the duty to make the place safe, or where he is engaged in so doing.

Free v. Home Telephone Co., 9, 16 (4).

16. *Injuries to Servant.—Action.—Complaint.—Sufficiency.*—In an action for the death of a factory employe caused by an unguarded shaft coupling, allegations in the complaint that during the time decedent was employed by defendant and subject to the orders and direction of his foreman, and at a time when the unguarded shaft coupling was open and exposed and was being revolved by defendant with force and speed, the foreman carelessly and negligently ordered decedent to place a telephone wire on the joists and ceiling of the factory room

MASTER AND SERVANT—Continued.

across the line shaft and over the coupling, sufficiently show, when aided by permissible inferences, that decedent was directed to place the wire over the shaft coupling while it was in motion. *Indiana Mfg. Co. v. Coughlin, Admr.*, 268, 282 (10).

17. *Injury to Servant.—Action.—Factory Act.—Guarding Dangerous Machinery.—Complaint.*—In an action for the death of a factory employe predicated on §9 of the Factory Act, §8029 Burns 1914, Acts 1899 p. 231, 233, requiring dangerous machinery to be guarded, the duty to guard machinery must be determined in relation to, and in the light of, all the averments in the complaint showing the employment and duties of the particular person invoking the protection of the statute at the time he received his injury.

Indiana Mfg. Co. v. Coughlin, Admr., 268, 281 (9).

18. *Injuries to Servant.—Factory Act.—Construction.—Dangerous Machinery.—Guards.*—The provisions of §9 of the Factory Act, §8029 Burns 1914, Acts 1899 p. 231, 234, requiring dangerous machinery to be guarded, should receive from the courts an interpretation and construction which will carry out the statute's evident purpose to protect those who work around dangerous machinery from injury therefrom, and not to impose unreasonable requirements or onerous and unnecessary burdens on the factory owner.

Indiana Mfg. Co. v. Coughlin, Admr., 268, 279 (7).

19. *Injuries to Servant.—Factory Act.—Scope.—Dangerous Machinery.—Guards.*—Section 9 of the Factory Act, §8029 Burns 1914, Acts 1899 p. 231, 233, requiring that dangerous machinery be guarded, while not intended to impose upon the factory owner unreasonable burdens, so as to require him to guard his laborers against every possible danger, extends protection to all laborers in factories using dangerous machinery, regardless of the number exposed, or the character of the work which exposes them to the danger, and where a factory employe was injured by an unguarded coupling while installing a system of telephone wires over a line shaft under the orders and direction of the master, it was the employer's duty under the statute to guard such coupling, and the failure to do so was negligence, although it was the first occasion upon which any employe had been brought in dangerous proximity to the coupling.

Indiana Mfg. Co. v. Coughlin, Admr., 268, 279 (8).

20. *Injuries to Servant.—Action.—Complaint.—Sufficiency.*—In an action by a coal mine employe for personal injuries, a complaint alleging that defendant mine owner negligently failed to keep the mine room where plaintiff was ordered to work reasonably safe and failed to remove from the roof certain loose slate and rock, which fell upon and injured plaintiff while he was in the performance of his duties, and that the dangerous condition was known to defendant, but not to plaintiff, sufficiently charges a violation of the employer's common-law duty to keep the working place reasonably safe.

Peacock Coal, etc., Co. v. Crawford, 401, 403 (2).

21. *Injuries to Servant.—Instructions.—Applicability to Issues.—Duty to Inspect Mines.*—In an action by a coal mine employe for personal injuries, an instruction that it was defendant's duty, by its mine boss, to visit and examine plaintiff's working place each alternate day and in addition thereto to exercise

MASTER AND SERVANT—Continued.

ordinary care "all to the end that loose coal, slate, or rock overhead in the room where plaintiff was required to work should either be taken down or carefully secured," was erroneous, where neither the complaint nor the evidence raised the issue of the mine owner's statutory duty to inspect, and because it in effect informed the jury as to what would constitute the exercise of ordinary care.

Peacock Coal, etc., Co. v. Crawford, 401, 404, 405 (3).

22. *Injuries to Servant.—Inspection of Mines.—Duty of Owner.*—The mine owner's statutory duty to inspect the mine refers to travel and air ways, and not to the miner's working place.

Peacock Coal, etc., Co. v. Crawford, 401, 405 (4).

23. *Injuries to Servant.—Instructions.—Coal Mines.—Duty to Remove Loose Coal.*—In an action by a mine employe for injuries caused by a fall of coal and rock from the roof of a mine, an instruction that it was the mine owner's duty to remove from the roof of the room where plaintiff was at work all loose slate, coal, or rock, wherever it was impracticable to prop it, was erroneous, since such duty is required by statute only in travel and air ways.

Peacock Coal, etc., Co. v. Crawford, 401, 405 (6).

24. *Injuries to Servant.—Instructions.—Statutory Duty to Inspect Mines.*—In an action by a coal mine employe for injuries caused by a fall of loose coal from the roof of a mine room, an instruction that it was negligence imputable to defendant mine owner if its mine boss did not make the inspection required by statute, but omitting to state the duties prescribed by statute, is erroneous because submitting a question of law to the jury. *Peacock Coal, etc., Co. v. Crawford*, 401, 406 (7).

25. *Injury to Servant of Independent Contractor.—Liability.*—Where an owner of realty engages an independent contractor to erect a building or other structure, and the contract requires the performance of work intrinsically or necessarily dangerous, the owner may be held liable to third persons and the contractor's employes injured during the progress of the work.

Looney v. Prest-O-Lite Co., 617, 623 (4).

26. *Injury to Servant of Independent Contractor.—Liability.—Violation of Law.*—An owner of realty, who engages an independent contractor to erect a building or other structure, may be held liable to third persons and the contractor's employes injured in the course of construction, where the work is being done in violation of law or creates a nuisance, or the injury results from some affirmative act or negligence of the owner.

Looney v. Prest-O-Lite Co., 617, 623 (5).

III. WORKMEN'S COMPENSATION.

See also MARRIAGE 4.

27. *Injuries to Servant.—Accident Growing Out of Employment.—Negligence.*—In a proceedings for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, the fact that claimant, after becoming overheated and wet with perspiration while flushing a quantity of hot pulp out of a basement, voluntarily exposed himself in the open air on his way home after work and took a chill would not be a defense under the act to a claim for compensation for nephritis following the chill,

MASTER AND SERVANT—Continued.

because where the primary injury arises out of the employment, every consequence which flows from it likewise arises out of the employment, and, though claimant's conduct was negligent, it could not defeat his right to compensation, since mere negligence is not a defense to such a claim.

United Paperboard Co. v. Lewis, 356, 363 (4).

28. *Injuries to Servant.—Workmen's Compensation Act.—Accident Arising Out of and in Course of Employment.—Evidence.—Sufficiency.*—In a proceedings for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, evidence showing that a factory employe, whose ordinary duty was to keep the factory basement clean, was ordered to flush into a sewer with a stream of hot water a quantity of steaming pulp which had been dumped on the basement floor because of the breaking of a pipe, that in performing the work the employe became overheated and wet with perspiration, with the result that, when he came into contact with the open air while on his way from work to his home, he took a chill and nephritis subsequently developed, is sufficient to support a finding that the nephritis arose both out of and in the course of the employment within the terms of the act.

United Paperboard Co. v. Lewis, 356, 362 (3).

29. *Injuries to Servant.—Workmen's Compensation Acts.—Construction.—Accident in Course of Employment.*—The words "by accident arising out of and in the course of the employment," as used in workmen's compensation acts, should be given a broad and liberal construction, and an injury is received in the course of the employment when it comes while the workman is performing the duty for which he is employed, and it arises out of the employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work was required to be performed and the resulting injury.

United Paperboard Co. v. Lewis, 356, 361 (2).

30. *Injuries to Servant.—Workmen's Compensation Act.—Disease by Accident.*—Where a factory employe, whose duty was to keep the factory basement clean, was directed to flush into a sewer with a stream of hot water a quantity of steaming pulp which had been dumped on the basement floor because of the breaking of a pipe, and in performing the work he became overheated and took a chill on the way to his home, and soon afterwards acute nephritis manifested itself, the Industrial Board was warranted in finding that the breaking of the pipe created an unusual condition under which the employe was required to render a service outside the line of his ordinary duties, resulting in enforced exposure, and nephritis, having been contracted as a direct result of the unusual circumstances of the employment, was a personal injury by accident within the provisions of the Workmen's Compensation Act, Acts 1915 p. 392, the rule being that diseases by accident, within the meaning of workmen's compensation acts, are those which cannot be reasonably anticipated as an ordinary result of the employe's work, but are contracted as a direct result of unusual circumstances connected therewith.

United Paperboard Co. v. Lewis, 356, 359 (1).

31. *Injuries to Servant.—Workmen's Compensation Act.—Medical Expenses.—Employer's Liability.*—Under §25 of the Work-

MASTER AND SERVANT—Continued.

men's Compensation Act, Acts 1915 p. 392, requiring an employer to furnish a physician for an injured employe only during "the thirty days after an injury," where an employe received no apparent injury at the time of an accident, but after the expiration of the thirty-day period an injury developed from such accident which required medical attention, a physician who was called to render the necessary medical services was entitled to have his claim allowed for services rendered within thirty days after the development of the injury, since under the act the date of the injury and not of the accident fixes the time when the employer's liability for physician's services begins.

In re McCaskey, 349, 351 (1).

32. *Injuries to Servant.—Workmen's Compensation Act.—Review of Award.—Sufficiency of Evidence.*—In a proceedings for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, where there is evidence tending to show that the employe was in reasonably good health prior to his injury, and undisputed evidence to show that he was rendered unconscious by falling from a stairway as he was about to enter the employer's premises to begin work, the fall being caused by the knob coming off a door he was attempting to open, that after the injury he was taken to his home and did not resume his employment for about a week, that after working a few days he became totally disabled, and that previously to his injury he had been able to work continuously for a long period of time, such evidence is sufficient to warrant the inferences necessary to sustain the Industrial Board's award for total disability due to the injury alleged.

Indianapolis Abattoir Co. v. Coleman, 369, 371 (1).

33. *Injury to Servant.—Workmen's Compensation Act.—Right to Award.—Acceleration of Latent Disease.*—In a proceedings by an injured servant for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, the fact that the employe was afflicted with a latent disease which the injury accelerated to a stage of total disability, would not of itself prevent an award of compensation for total disability due to the injury.

Indianapolis Abattoir Co. v. Coleman, 369, 372 (3).

34. *Workmen's Compensation Acts.—Injury to Employe Afflicted with Disease.—Right to Award.*—Where an employe afflicted with disease receives a personal injury under such circumstances that he might have obtained compensation under a workman's compensation act on account of the injury had there been no disease involved, but the disease is materially aggravated or accelerated by the injury, resulting in disability or death earlier than would otherwise have occurred, and the disability or death does not result from the disease alone progressing naturally as it would have done under ordinary conditions, but the injury, aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the Workmen's Compensation Act (Acts 1915 p. 392).

In re Bowers et al., 128, 133 (6).

35. *Workmen's Compensation Act.—Scope.—Construction.—Rights and Remedies.*—In view of §6 of the Workmen's Compensation Act (Acts 1915 p. 392), providing that the rights and remedies created in favor of an injured employe shall exclude all other rights and remedies in his favor and against his

MASTER AND SERVANT—Continued.

employer at common law, it should be presumed from a consideration of the general spirit of the act that the legislature did not intend to narrow the rights of an injured employe, but rather that the rights and remedies afforded by the act should extend to all situations wherein, if there was no workmen's compensation act, an injured employe would have his remedy at common law for injuries received, and the act should be so construed where its language reasonably permits, the general purpose of the act being to substitute its provisions for pre-existing rights and remedies. *In re Bowers et al.*, 128, 132 (4).

36. *Workmen's Compensation Act.—Measure of Compensation.*—Sections 29 and 30 of the Workmen's Compensation Act (Acts 1915 p. 392), specify a rule of admeasurement of compensation both where the injury causes partial disability, or total disability, which includes death. *In re Bowers et al.*, 128, 132 (2).

37. *Workmen's Compensation Act.—Scope.—Right to an Award.*—Where the enterprise is being conducted and the work is being done subject to the provisions of the Workmen's Compensation Act (Acts 1915 p. 392), the right to an award of compensation is extended, under §2, to all cases of personal injury of an employe or his death by accident arising out of and in the course of the employment, personal injury or death due to the employe's own wilful misconduct being excepted by §8 of the act. *In re Bowers et al.*, 128, 131 (1).

38. *Workmen's Compensation Act.—Appeals.—Time for Perfecting.*—Under §61 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that an appeal may be taken to the Appellate Court within thirty days from the date of an award by the Industrial Board, where, in an appeal from an award, the transcript and assignment of errors was not filed until after the expiration of the thirty-day period, they were too late, and the appeal must be dismissed.

C. and W. Kramer Co. v. Miller, 127.

39. *Workmen's Compensation Act.—Personal Injury.*—Under §76d of the Workmen's Compensation Act (Acts 1915 p. 392), the term "personal injury," as used in the act, does not include disease in any form except as it results from the injury.

In re Bowers et al., 128, 132 (3).

40. *Workmen's Compensation Act.—Partial Dependent.—Measure of Compensation.*—Under §37 of the Workmen's Compensation Act, Acts 1915 p. 392, prescribing the amount of compensation to one partially dependent upon a deceased employe, where a mother is a partial dependent on a minor child and receives all his wages, she is entitled to the same compensation as if she had been totally dependent.

Bloomington, etc., Stone Co. v. Phillips, 189, 194 (6).

41. *Workmen's Compensation Act.—Partial Dependency.*—Where a divorced mother maintained herself, her minor son, and three dependent minor children from a common fund composed of the wages of the son and her own income, the husband having been ordered, as part of the judgment in the divorce case, to pay the wife \$12 per month, but had paid only \$18 in a period of seven months, the mother was partially dependent on the minor son within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392.

Bloomington, etc., Stone Co. v. Phillips, 189, 194 (5).

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42. *Workmen's Compensation Act.—Total Dependency.*—"Total dependency" upon a deceased employe, within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392, exists where the dependent subsists entirely on the earnings of decedent, but claimants are not deprived of the rights of total dependents, when otherwise entitled thereto, on account of temporary gratuitous services rendered them by others, occasional financial assistance received from other sources, or other minor considerations or benefits.
Bloomington, etc., Stone Co. v. Phillips, 189, 194 (4).
43. *Workmen's Compensation Act.—Dependency.—Determination.*—The fact that a claimant for compensation could have supported life without contributions from a deceased employe, or that such contributions were absolutely necessary to the reasonable support of the claimant is not controlling in determining the question of dependency within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392, but the inquiry should be directed to ascertaining whether contributions from deceased had been looked to, depended and relied on, in whole or in part, by the claimant for means of reasonable support.
Bloomington, etc., Stone Co. v. Phillips, 189, 193 (3).
44. *Workmen's Compensation Act.—Partial Dependency of Parent.—Determination.*—A divorced mother maintaining herself, her minor son and three other dependent minor children from a common fund composed of the earnings of the son and her own income, does not come within the class where dependency upon a deceased employe is conclusively presumed under §38 of the Workmen's Compensation Act, Acts 1915 p. 392, and her dependency must be determined in accordance with the facts at the time of the injury.
Bloomington, etc., Stone Co. v. Phillips, 189, 193 (2).
45. *Workmen's Compensation Act.—Findings by Industrial Board.—Conclusiveness.*—The determination by the Industrial Board of questions of fact is conclusive on appeal, if there is any evidence to support the findings of the board.
Bloomington, etc., Stone Co. v. Phillips, 189, 192 (1).
46. *Workmen's Compensation Act.—Award.—Right to Review.*—Under §60 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that an application for review may be made if the first hearing was not before the full board, the Industrial Board has no power to review an award where the first hearing was before the full board, and any award made on such review is a nullity.
Kingan & Co. v. Buford, 182.
47. *Workmen's Compensation Act.—Partially Dependent Parent.—Amount of Compensation.*—Under §37 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that the compensation of a partial dependent shall be in the same proportion to the weekly compensation for persons wholly dependent as the amount contributed by the deceased employe to such partial dependent bears to his annual earnings at the time of his injury, where a father, partially dependent on a minor son, received all his son's earnings, there is no difference between the amount of compensation that a total dependent and a partial dependent is entitled to receive under the act.
In re Peters, 174, 181 (7).

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48. *Workmen's Compensation Act.—Dependent Parent.—Amount of Compensation.—Cost of Maintenance of Contributing Child.*—Where a father supported his entire family out of a fund composed of the earnings of himself and a minor son, so that the father was a partial dependent, the cost of the maintenance of the contributing son should not be considered in determining the amount of compensation to which the dependent father is entitled under the Workmen's Compensation Act, Acts 1915 p. 392, for the son's death. *In re Peters*, 174, 179 (6).
49. *Workmen's Compensation Act.—Partial Dependency of Parent.*—Where a father, earning \$15 weekly, supported his family from a fund composed of his wages and those of a minor son, who earned \$12.75 a week, the father was only partially dependent on the son within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392. *In re Peters*, 174, 179 (5).
50. *Workmen's Compensation Act.—Dependency of Father.—Evidence.*—Where weekly contributions from his wages made by a minor son to his father, who earned \$15 weekly, were used and required for the support of the family, consisting of the father, mother, and three minor children, and the father owned no property and had no income with which to maintain the family except his own wages and the contributions of the son, such facts are sufficient to warrant the Industrial Board in drawing the inference that the father was dependent on the son within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392. *In re Peters*, 174, 178 (4).
51. *Workmen's Compensation Act.—Dependent Parent.*—The word "dependent," as used in the Workmen's Compensation Act, Acts 1915 p. 392, should be given a meaning broad enough to include the reasonable needs of a parent in the proper support of himself and dependent family. *In re Peters*, 174, 178 (3).
52. *Workmen's Compensation Acts.—Dependency of Parent.*—Want or distress need not exist before a condition of dependency arises, and a parent or his family need not reduce their expense of living below a reasonable standard in order to escape dependency and thereby absolve an employer from the payment of compensation for which he would otherwise be liable. *In re Peters*, 174, 177 (2).
53. *Workmen's Compensation Act.—Dependency of Father on Minor Son.—Question of Fact.*—As §38 of the Workmen's Compensation Act, Acts 1915 p. 392, does not include the father of a minor son in any of the classes in which dependency is conclusively presumed, the question of his dependency on the earnings of the son, and the degree thereof, must be determined in accordance with the existing fact at the time of the injury. *In re Peters*, 174, 177 (1).
54. *Workmen's Compensation Act.—Awards.—Review.—Evidence.—Weight and Sufficiency.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, where there is competent evidence to support the decision of the Industrial Board, the court on appeal cannot pass upon its weight and sufficiency. *United Paperboard Co. v. Lewis*, 356, 365 (6).
55. *Workmen's Compensation Act.—Awards.—Review.—Evidence.—Admissibility.*—The Industrial Board, created by the

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Workmen's Compensation Act, Acts 1915 p. 392, is not a court, but an administrative body, and should not be held to strict rules governing the admission of evidence, and the admission of incompetent evidence will not operate to reverse an award, if there is evidence to support it.

United Paperboard Co. v. Lewis, 356, 364 (5).

56. *Workmen's Compensation Act.—Findings by Industrial Board.*—The Industrial Board's determination of a question of fact is conclusive on appeal, where there is any evidence to support it.

In re McCaskey, 349, 355 (2).

57. *Workmen's Compensation Act.—Findings of Industrial Board.—Review.*—Under §61 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that an award of the Industrial Board shall be conclusive as to all questions of fact, where the testimony of medical witnesses as to the cause of decedent's death was conflicting, but a part of such testimony sustained the finding of the board, its finding is conclusive on appeal.

Waterman v. Riehl, 347.

58. *Workmen's Compensation.—Findings by Industrial Board.—Review.*—Where there is sufficient evidence to warrant a conclusion of the Industrial Board on a question of fact, the finding will not be disturbed on appeal.

Meehan v. Edward Valve, etc., Co., 342, 346 (6).

59. *Workmen's Compensation Act.—Independent Contractor.*—In an action for an award under the Workmen's Compensation Act, Acts 1915 p. 392, evidence showing that plaintiff was employed by defendant to haul material for it both by the load and by the hour, using either his own wagon or one of defendant's, and that he also worked for others, that the defendant could terminate the employment at any time, that the work he was performing when injured was under the control of defendant, and that at the time of the injury he was using his own transfer wagon, is sufficient to sustain a finding that plaintiff was an employee and not an independent contractor.

Columbia School Supply Co. v. Lewis, 339, 341 (1).

60. *Workmen's Compensation Act.—Findings of Industrial Board.—Review.—Weighing Evidence.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, where there is some evidence to sustain the findings of the board, the court on appeal will not weigh the evidence.

Columbia School Supply Co. v. Lewis, 339, 341 (2).

61. *Workmen's Compensation Act.—Construction.—Partial Disability.—Compensation.*—Under §30 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that where injury causes the employee partial disability for work, he shall be paid during such disability a weekly compensation equal to one-half of the difference between his average weekly wages and the weekly wages at which he is actually employed after the injury, for a period not to exceed 300 weeks, and §40, providing that "in computing compensation under the foregoing sections, the average weekly wages of an employee shall be considered not to be more than twenty-four dollars, nor less than ten dollars," where a servant, when injured, earned an average weekly wage of \$56, and during a period of partial disability subsequent to the injury earned an average weekly wage of \$25, he could be awarded additional compensation, since the act does not author-

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ize payment of compensation for the period of partial disability when the injured employee's average weekly wages during such exceeds twenty-four dollars. *In re Dove*, 299.

62. *Workmen's Compensation Act.—Payment of Compensation in Lump Sum.—Power of Board to Approve.*—Under the Workmen's Compensation Act, Acts 1915 p. 392, the Industrial Board has no power to approve a compensation agreement between the widow and employer awarding the widow a lump sum in place of the award provided in §37 of the act, which authorizes the payment of burial expenses and fifty-five per cent. of decedent's average weekly wages for a period of 300 weeks, where the facts of the case do not show it to be an unusual one within the terms of §43 of the act, providing for the payment of a lump sum, on the approval of the Industrial Board, in unusual cases where weekly payments have been made for not less than twenty-six weeks. *In re Beggs*, 294.

63. *Workmen's Compensation Act.—Construction.—Degrees of Disability.*—The doctrine of the degree of disability prior to the injury, degree of disability caused entirely by the injury, degree of disability caused entirely by disease, and degree of disability which might have resulted from the disease alone has no application to proceedings for relief under the Workmen's Compensation Act, Acts 1915 p. 392.

Indianapolis Abattoir Co. v. Coleman, 369, 372 (4).

64. *Workmen's Compensation Act.—Industrial Board's Findings.—Conclusiveness.*—Where the evidence on a question of fact is conflicting, the finding of the Industrial Board is conclusive.

Indianapolis Abattoir Co. v. Coleman, 369, 372 (2).

65. *Workmen's Compensation Act.—Construction.—Loss of Fingers.—Award.*—Section 31 of the Workmen's Compensation Act, Acts 1915 p. 392, prescribing a schedule of compensation for the loss of a finger, thumb and other specific injuries, and providing that in all other cases of permanent partial disability compensation shall be paid in the amount determined by the Industrial Board, not to exceed fifty-five per cent. of the average weekly wages for 200 weeks, was intended to apply to all cases of permanent partial disability and is mandatory as to the injuries specified, but where an employee in one accident loses two or more fingers the amount of compensation will not be determined by multiplying the allowance for one finger by the number lost, since otherwise compensation for the loss of a thumb and four fingers could exceed that for a whole hand, a result not intended by the legislature, but in such a case the award will be fixed by the board under the general clause for a period not to exceed 200 weeks, except that an allowance for a less injury cannot, unless the circumstances are extraordinary, be made for more than provided in the specific schedule for a greater injury. *In re Maranovitch*, 489, 491 (2).

66. *Workmen's Compensation Act.—Right of Appeal.—Certification of Questions of Law.—Res Adjudicata.*—Where, in a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, the Industrial Board before rendering an award certified a question of law to the Appellate Court under §61 of the act, the court's answer to such question was primarily for the information and guidance of the board in any case before it and it did not adjudicate the case which gave

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rise to the question, since the proceedings relating to the certified question were not adversary in character and there were no issues in a technical sense, and the nature of such proceedings was not changed by the mere fact that a third person, who appeared as appellant's counsel in the subsequent appeal, was permitted to file a brief as an *amicus curae*.

Bimel Spoke, etc., Co. v. Loper, 479, 484 (1).

67. *Workmen's Compensation Act.—Appeals.—Assignments of Error.—Sufficiency.—Scope of Review.*—Section 61 of the Workmen's Compensation Act, Acts 1915 p. 392, as amended by the act of 1917 (Acts 1917 p. 154), providing that in appeals from awards of the Industrial Board an assignment that the award of the full board is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts, does not prevent the appellant from presenting other questions of law, nor from making separate assignments of error as to each of the two propositions which the act authorizes to be presented by one assignment.

Bimel Spoke, etc., Co. v. Loper, 479, 485 (2).

68. *Workmen's Compensation Act.—Appeals.—Assignments of Error.—Sufficiency.*—Under §61 of the Workmen's Compensation Act, Acts 1915 p. 392, as amended by the act of 1917 (Acts 1917 p. 154), governing appeals from awards by the Industrial Board, on an appeal from an award of compensation an assignment of error that the full board erred in overruling defendant's motion to set aside an award made by one member of the board and also the award made by the full board, and to thereupon hear the parties, their representatives and witnesses, is sufficient.

Bimel Spoke, etc., Co. v. Loper, 479, 486 (3).

69. *Workmen's Compensation Act.—Award by Less than Full Board.—Review.—Discretion of Board.*—Under §60 of the Workmen's Compensation Act, Acts 1915 p. 392, as amended by the act of 1917 (Acts 1917 p. 154), providing for a review of an award of part of the Industrial Board by the full board, which "shall review the evidence, or if deemed advisable, hear the parties at issue," it is discretionary with the board whether it will review the evidence from the transcript of the former hearing or conduct a new hearing, and the board's action in this respect will not be reviewed on appeal unless it clearly appears that there has been an abuse of discretion.

Bimel Spoke, etc., Co. v. Loper, 479, 486 (4).

70. *Workmen's Compensation Act.—Appeal.—Review.—Sufficiency of Evidence.—Inferences.*—Ultimate facts need not be proved by a particular kind of evidence, and an award of the Industrial Board is sustained by the evidence if there are facts in evidence from which the essential ultimate facts may reasonably be inferred, and the court on appeal will not disturb such finding, although inferences other than those drawn by the board might be reasonably warranted.

Bimel Spoke, etc., Co. v. Loper, 479, 487 (5).

71. *Workmen's Compensation Act.—Award.—Review.—Evidence.—Sufficiency.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, for the death of a servant, evidence showing that while deceased was performing the duties of his employment, defendant's assistant

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superintendent, as an act of sport, turned the air from an air compressor upon him, causing deceased to quickly jerk and straighten his body, that immediately thereafter he became ill and died within two days, and that an autopsy disclosed that the intestines were diseased prior to the injury, but that the conditions found which caused death might have been the result of the accident to decedent, was sufficient to sustain a finding of the Industrial Board that the cause of death was injuries sustained by deceased as a result of having the compressed air turned upon him. *Bimel Spoke, etc., Co. v. Loper*, 479, 487 (6).

72. *Workmen's Compensation Act.—Appeal.—Assignment of Error.—Questions Presented.*—On an appeal from an award by the Industrial Board, an assignment of error that the award is contrary to law is sufficient to present both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts.

Bucyrus Co. v. Townsend, 687, 688 (1).

73. *Workmen's Compensation Act.—Award.—Necessary Showing.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, for the death of a servant, it must be made to appear that decedent received a personal injury by accident arising out of and in the course of his employment, and that the death of the employe resulted from the injury, before the Industrial Board can allow compensation to a defendant.

Bucyrus Co. v. Townsend, 687, 690 (2).

74. *Workmen's Compensation Act.—Evidence.—Sufficiency.*—In a proceeding by dependents for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, for the death of a servant, evidence that decedent, while engaged at his employment, slipped and fell in such a manner as to strike his breast against an iron rod on the machine he was operating, that after the accident he was confined to his bed suffering from pain in his left side and breathing with difficulty, that prior to the accident decedent had been in good health and had not complained of any ailment of the heart or lungs, and testimony by the attending physician that the fall brought on a condition of the heart known as pericarditis which resulted in death, is sufficient to show an injury by accident arising out of and in the course of decedent's employment, and that it proximately caused his death.

Bucyrus Co. v. Townsend, 687, 690 (3).

75. *Workmen's Compensation Act.—Cause of Death.—Proof.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, for the death of a servant, claimants were not required to present such proof as would entirely exclude the possibility that decedent's death was due in part to a diseased condition of his heart.

Bucyrus Co. v. Townsend, 687, 690 (4).

76. *Workmen's Compensation Act.—Right to Compensation.—Sisters and Nieces.—Proof of Dependency.*—As §38 of the Workmen's Compensation Act, Acts 1915 p. 392, does not include sisters and nieces in any of the classes in which dependency is conclusively presumed, the dependency of a sister and a niece must be determined in accordance with the fact at the time of the death of the employe. *In re Lanman*, 636, 640 (1).

77. *Workmen's Compensation Act.—Right of Sister to Compensation.—Dependency.*—Where a sister of a deceased employe

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lived in his home for a number of years preceding his death with the understanding that deceased was to furnish the home and provide for her, and that she was to act as his housekeeper, and during such period deceased gave to the sister, who had no independent means of her own, all his earnings, with which the expenses of the home, including her entire support, were paid, the agreement does not show such a contractual relation as to deprive her of compensation as a dependent under the Workmen's Compensation Act, Acts 1915 p. 392, but rather the support was furnished in recognition of a moral obligation, and she was entitled to compensation as a total dependent, even though she may have been able to work for others and support herself.

In re Lanman, 636, 640 (2).

78. *Workmen's Compensation Act.—Right to Compensation.—Niece.*—Where a deceased employe's niece, who was a minor and whose home was with her parents, stayed with deceased the greater portion of each week for several years when school was in session as a matter of convenience, the mere fact that during such time deceased gratuitously furnished her board, some of her clothes and some of her school supplies did not make her a dependent on him within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392.

In re Lanman, 636, 643 (3).

79. *Workmen's Compensation Act.—Relationship of Master and Servant.—Sufficiency of Evidence.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, evidence that a contractor engaged a farmer to do hauling at odd times when not busy on his farm, the contractor stating at the time of employment that he would be away part of the time and that he wanted somebody to look after the hauling *and take it off his mind*, and while at work on the job the farmer saw the contractor on only one occasion, and the latter never gave any directions in reference to the work, except that he wanted the goods delivered, and never exercised any control over the farmer, who was paid sixty-five cents an hour per team, does not show the relation of employer and employe, but that the farmer was an independent contractor, since the contractor in employing him reserved no control over the manner of doing the work.

Zeitlow v. Smock, 643, 653 (10).

80. *Workmen's Compensation Act.—Appeal.—Presenting Questions for Review.—Assignment of Error.*—Under §61 of the Workmen's Compensation Act, Acts 1915 p. 392, as amended by the act of 1917, Acts 1917 p. 154, the assignment of error that the award of the full board is contrary to law is authorized and is sufficient to present for review on appeal both the sufficiency of the facts found to sustain the award, and the sufficiency of the evidence to sustain the finding of facts.

Zeitlow v. Smock, 643, 646, 648 (1).

81. *Workmen's Compensation Act.—Powers of Industrial Board.—Rules of Procedure.*—Section 55 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that the procedure thereunder shall be as summary and simple as reasonably may be, and that, for the purpose of carrying out the provisions of the act, the Industrial Board may make rules not inconsistent with it, empowered the board to promulgate a rule that no

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answer is required and, if none is filed, the allegations contained in the application, petition or complaint will be deemed to be denied. *Zeitlow v. Smock*, 643, 647 (2).

82. *Workmen's Compensation Act.—Appeal.—Presumptions.*—On an appeal from an award by the Industrial Board, the Appellate Court will indulge every reasonable presumption in favor of sustaining the award, but, in the absence of anything in the record showing such fact, the presumption cannot be indulged, in favor of the board's action, that a rule that if no answer is filed the allegations of the petition would be deemed to be denied was made and published by the board and in force at the time of the hearing of the case appealed.

Zeitlow v. Smock, 643, 647 (3).

83. *Workmen's Compensation Act.—Reserving Grounds for Review.—Failure to File Answer.—Necessity of Objection.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, where both parties appeared before the board and the cause was heard and determined without any suggestion that no answer to the complaint or petition had been filed by the employer, the petitioner cannot take any advantage of the failure to answer, if an answer was required, even under the rules of civil procedure. *Zeitlow v. Smock*, 643, 647 (4).

84. *Workmen's Compensation Act.—Proceedings for Award.—Burden of Proof.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, by an injured servant against the employer, the burden is on the petitioner, as in ordinary civil actions, to show each of the facts necessary to entitle him to the benefits of the provisions of the act.

Zeitlow v. Smock, 643, 647 (5).

85. *Workmen's Compensation Act.—Appeals.—Presenting Questions for Review.—Sufficiency of Evidence.—Exception to Finding of Fact.*—The Workmen's Compensation Act, Acts 1915 p. 392, does not require or contemplate an exception to the finding of the Industrial Board to present the question of the sufficiency of the evidence to support the finding on appeal to the Appellate Court.

Zeitlow v. Smock, 643, 648 (6).

86. *Workmen's Compensation Act.—Appeals.—Relation of Master and Servant.—Finding of Board.—Conclusiveness.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, where the evidence as to whether the applicant is an employe is conflicting, there being evidence showing or tending to show such relationship, it is the exclusive duty and province of the Industrial Board to weigh the evidence and draw any and all reasonable inferences therefrom, and its conclusion is final and not subject to review, but when the evidence affecting such question is undisputed and is reasonably susceptible of but a single inference, the question of what relation is shown to have existed is a law question.

Zeitlow v. Smock, 643, 649 (7).

87. *Workmen's Compensation Act.—Appeals.—Relationship of Master and Servant.—Question of Law.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, if there is no evidence showing the relationship of master and servant, or from which such relationship may reasonably be inferred, the court on appeal must apply the law to the facts, and hold as a matter of law that the relationship

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is not shown, although the Industrial Board has made a contrary finding. *Zeitlow v. Smock*, 643, 649 (8).

88. *Workmen's Compensation Act.—Partial Dependency.—Evidence.—Question for Industrial Board.*—In a proceeding for an award for the death of a servant under the Workmen's Compensation Act, Acts 1915 p. 392, where the wife had attempted to require her husband to discharge his legal obligation to support his family, which lived apart from him, but had only been partially successful, her efforts to some extent indicate a reliance on contributions from him to aid her in supporting herself and children, and where for a number of years immediately preceding the husband's death his contributions to the family's maintenance were irregular both as to intervals and amounts, and the wife was furnishing the substantial means of support, such facts are not conclusive that a state of dependency did not exist and are sufficient to present to the Industrial Board for determination as a question of fact whether the wife, or children, or both, were partial dependents.

In re Carroll, 146, 155 (7).

89. *Workmen's Compensation Act.—Dependency.—Evidence.—Sufficiency.*—In a proceedings for an award for the death of a servant under the Workmen's Compensation Act, Acts 1915 p. 392, evidence, when aided by proper deductions, showing that decedent's widow and children did not live with him for a number of years immediately preceding his death, that deceased during such time made contributions to his family, irregular both as to intervals and amounts, and that the wife was furnishing the substantial means of support, is not sufficient to establish, as a matter of law, that either the wife or the children were wholly dependent on decedent for support.

In re Carroll, 146, 154 (6).

90. *Workmen's Compensation Act.—Dependency.—Elements.*—Among the elements that are indicative of a state of dependency, within the Workmen's Compensation Act (Acts 1915 p. 392), are an obligation to support, the fact that contributions have been made to that end, that the claimant in any case is shown to have relied on such contributions and their continuing, and the existence of some reasonable grounds as a basis for a probability of their continuance or a renewal thereof if interrupted, although it is not necessary to a state of dependency that all of such elements must exist, but, as a rule, subject to certain exceptions, the fact that contributions have been made is an essential element of dependency within the meaning of the act.

In re Carroll, 146, 154 (5).

91. *Workmen's Compensation Act.—Dependent.*—Generally, a dependent within the meaning of workmen's compensation acts, is one who looks to another for support, or is in fact dependent, or relies on another for the reasonable necessities of life, and in determining dependency the inquiry should not be confined to the question whether the family of the deceased workman could have supported life without any contributions from him, or whether such contributions were absolutely necessary to the reasonable maintenance of the family, but rather the inquiry should include the question whether his contributions were looked to, depended and relied on, in whole or in part, by the family for means of reasonable support.

In re Carroll, 146, 153 (4).

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92. *Workmen's Compensation Act.—Dependency.—Burden of Proof.*—In a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, by one seeking an award as a dependent, the burden is on the claimant to establish by evidence the facts showing dependency. *In re Carroll*, 146, 153 (3).
93. *Workmen's Compensation Act.—Dependency.—Question of Fact and Law.—Appeal.*—Questions of dependency, as the term is used in the Workmen's Compensation Act (Acts 1915 p. 392), are, where no conclusive presumption of dependency arises under the act, mixed questions of law and fact, and it is the exclusive province of the Industrial Board to determine the facts and draw legitimate inferences therefrom and to determine in the first instance from the facts and inferences whether dependency exists, but the action of the board in the latter respect is reviewable by the Appellate Court when an appeal is taken under §61 of the act. *In re Carroll*, 146, 153 (2).
94. *Workmen's Compensation Act.—Determination of Compensation to Partial Dependent.*—Under the Workmen's Compensation Act, Acts 1915 p. 392, in determining the amount of compensation to be paid a partial dependent, the inquiry respecting the amount contributed by the deceased employe to such partial dependent is not limited to the time of the injury, but the entire period during which contributions were made may be considered. *In re Carroll*, 146, 156, 157 (9).
95. *Workmen's Compensation Act.—Construction.—Dependents.—Presumptions.*—Under §38 of the Workmen's Compensation Act, Acts 1915 p. 392, providing that a wife living with a husband at the time of his death, and a child under the age of eighteen living with a parent at the time of his or her death, there being no surviving parent, shall be conclusively presumed to be wholly dependent for support upon deceased, but in all other cases dependency shall be a question of fact, a wife or child or both may be conclusively presumed to be wholly dependent, or, on inquiry into the facts, may be found to be either wholly or partially dependent, and where the situation exists that gives rise to the presumption that the wife or child is wholly dependent, there can be no further inquiry, regardless of what the real facts are, but, in order that such situation may arise in favor of a wife, she must be living with her husband at the time of his death, and in order that such conclusive presumption may be indulged in favor of a child, it must be less than eighteen years of age, must be living with the parent at the time of his death, and there must be a surviving parent either conclusively presumed to be wholly dependent or found to be either wholly or partially dependent. *In re Carroll*, 146, 151 (1).
96. *Workmen's Compensation Act.—Construction.*—The Workmen's Compensation Act, Acts 1915 p. 392, includes employes in all industrial pursuits, except those expressly exempted by §9 of the act. *In re Boyer*, 408, 411 (2).
97. *Workmen's Compensation Act.—Construction.—Scope.—Farm or Agricultural Laborers.*—One employed as a separator man on a threshing outfit that travels from farm to farm and is owned and operated as a business is not a farm or agricultural laborer within the meaning of §9 of the Employers' Liability Act, Acts 1915 p. 392, which exempts such laborers from the benefits of the act. *In re Boyer*, 408, 411 (3).

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98. *Workmen's Compensation Act.—Construction.—Permanent Partial Disability.—Loss or Impairment of Member.*—Where, in an accident, an employe suffers the loss of a member or the destruction of a physical sense for which provision is specifically made by §31 of the Workmen's Compensation Act, Acts 1915 p. 392, or suffers an injury resulting in permanent partial disability for which provision is not specifically made by that section, compensation must be awarded under such section, and, when so awarded it is in lieu of all other compensation for the particular permanent partial disability, but the section does not by its terms exclude compensation for other injuries sustained in the same accident for which provision is made by other sections of the act, nor does it purport to cover cases of the loss of two or more members of a particular class, unless the injury results only in a permanent partial disability.

In re Denton-Good, 426, 430 (1).

99. *Workmen's Compensation Act.—Compensation for Concurrent Disabilities.—Payment.—Consecutive Running of Periods.*—Where an employe is entitled to compensation, under the Workmen's Compensation Act, Acts 1915 p. 392, for a permanent partial disability, governed by §31, and also for temporary total disability, under §29, the injuries being sustained in the same accident, compensation should be awarded at the rate of fifty-five per cent. of the average weekly wages, and the periods should run consecutively, but not to extend beyond 500 weeks, and the total amount of compensation should not exceed \$5,000.

In re Denton-Good, 425, 438 (3).

100. *Workmen's Compensation Act.—Compensation.—Temporary Total Disability and Permanent Partial Disability.*—Where an employe, in one accident, suffers an injury producing a permanent partial disability, such as the loss of an arm or impairment in its use, and also a distinct injury resulting in temporary total disability, neither §31 of the Workmen's Compensation Act, Acts 1915 p. 392, governing awards of compensation for permanent partial disability, nor any other provision of the act, bars the injured employe from obtaining additional compensation for temporary total disability, as provided in §29.

In re Denton-Good, 426, 431 (2).

101. *Workmen's Compensation Act.—Construction.—Prosecutions.—Venue.*—Section 69 of the Workmen's Compensation Act, Acts 1915 p. 392, making it a misdemeanor for an employer accepting the compensation provisions of the law to fail to file with the Industrial Board, from time to time, evidence of his compliance with certain requirements of the act, requires that such evidence be deposited with the Industrial Board, the offices of which are, under §54, in Indianapolis, Marion county, and the venue of all prosecutions to impose the fine provided in §69 is in such county, since an offense involving an act of omission is committed where the act should have been done.

In re Industrial Board, 550, 551, 552 (1).

MECHANICS' LIENS—

1. *Notice.—Requisites and Sufficiency.*—A notice of intention to hold a mechanic's lien, in substantial conformity with the statute, is sufficient, and errors in respect to matters not re-

MECHANICS' LIENS—Continued.

quired to be included in the notice will not invalidate or defeat the lien. *Cline v. Indianapolis Mortar, etc., Co.*, 383, 388 (3).

2. *Notice.—Requisites and Sufficiency.—Statute.*—Under §8297 Burns 1914, Acts 1909 p. 295, providing that any person wishing to acquire a mechanic's lien shall file a notice of his intention to hold a lien, setting forth the amount claimed and giving a substantial description of the land, a notice of intention to hold a mechanic's lien need not state by whom the claim is owing. (*Windfall Natural Gas, etc., Co. v. Roe* [1908], 42 Ind. App. 278, disapproved.)

Cline v. Indianapolis Mortar, etc., Co., 383, 386, 387 (1).

3. *Notice.—Requisites and Sufficiency.*—A notice of intention to hold a mechanic's lien, addressed to the owners in terms, "You are hereby notified that" plaintiff "intend to hold a mechanic's lien on the following property," describing it, "as well as upon the house recently erected thereon by the" owners and the contractor, setting forth the amount, "for work and labor done, and materials furnished by us in the erection and construction of said house, which work and labor done, and materials furnished, and all other improvements, was done and furnished by us at your special request and instance and within the last sixty days" was sufficient under the statute (§8297 Burns 1914, Acts 1909 p. 295), though the materials were actually furnished at the request of the contractor.

Cline v. Indianapolis Mortar, etc., Co., 383, 389 (4).

4. *Statutes.—Construction.*—Mechanic's lien statutes must be strictly construed in determining the persons entitled to acquire and enforce such liens, but, being remedial in character, they should be liberally construed in favor of those entitled to their benefits. *Cline v. Indianapolis Mortar, etc., Co.*, 383, 387 (2).

MEMORANDUM—

Demurrer, scope of review, see **APPEAL** 89.

MENTAL CAPACITY—

See **INSANE PERSONS**.

MINES—

Inspection, see **MASTER AND SERVANT** 21-24.

Injuries to miners, action under Employer's Liability Act, see **MASTER AND SERVANT** 9.

MINORS—

Death of, elements of damage, see **DEATH**.

MISCONDUCT—

Of counsel, review, see **APPEAL** 47.

MORTGAGES—

Agent's consent to mortgage, effect on company, see **INSURANCE** 29.

Purchase price, foreclosure, see **HUSBAND AND WIFE**.

Foreclosure, time, statute, see **LIMITATION OF ACTIONS**.

MUNICIPAL CORPORATIONS—

1. *Contracts.—Public Improvements.—Validity.—Interest of Public Officer.—Statute.*—In an action by a materialman against a public improvement contractor and the surety on his bond to recover for materials furnished for use in paving a city street, an answer alleging that, at the time the improvement was being made and the materials sued for were furnished, plaintiff was a member of the municipal common council, and that when the pavement was completed the council, including plaintiff, inspected the work in behalf of the city, and accepted it both as to workmanship and materials, does not aver facts sufficient to show that the sale of materials upon which the action is predicated was in violation of §8648 Burns 1914, Acts 1907 p. 538, providing that no member of the common council of a city shall be interested in any contract with the city in any matter by which any indebtedness is created or approved, and that such contract shall be absolutely void.
Kerr v. State, ex rel., 102, 105 (1).
2. *Contracts.—Public Improvements.—Validity.—Interest of Public Officer.—Public Policy.*—That a member of a municipal common council sold materials to a contractor to be used in a public improvement, and that the common council inspected the work when completed in behalf of the city and accepted the same, is not sufficient to render the contract for the sale of materials unenforceable as being in contravention of public policy, in the absence of a showing that the councilman had any interest in the improvement contract either at the time of its execution or thereafter, or that the city or public was in any way defrauded by reason of the use of the materials so furnished.
Kerr v. State, ex rel., 102, 105 (2).
3. *Collision on Streets.—Proximate Cause.—Violation of Statute or Ordinance.*—Where plaintiff, driving an automobile, negligently crossed a city street intersection at a speed of eight miles an hour in violation of both a statute and a city ordinance, it does not conclusively follow that such violation was the proximate cause of plaintiff colliding with a telephone pole in attempting to avoid being struck by defendant's car, where the position of plaintiff's automobile at the time of the accident would not have been substantially different had she proceeded at the rate of speed fixed by the statute or ordinance.
Mayer v. Mellette, 54, 63 (8).
4. *Streets.—Use at Intersections.—Negligence.—Violation of Statute or City Ordinance.*—One driving an automobile across a street intersection at a speed of eight miles an hour in violation of §10465 Burns 1908, Acts 1907 p. 558, or an ordinance of the city of Indianapolis, is guilty of negligence.
Mayer v. Mellette, 54, 63 (7).
5. *Streets.—Priority of Right to Use at Street Intersections.*—The driver of an automobile, much closer to a street intersection than another driver, apparently had the right of way, there being no ordinance or regulation to the contrary, and, in the absence of an indication that it was imprudent to do so, she was authorized to go forward.
Mayer v. Mellette, 54, 59 (2).
6. *Streets.—Use at Intersections.—Right of Parties.*—Although it is the general rule that when two automobiles are approaching a street crossing the one nearest thereto has the right of

MUNICIPAL CORPORATIONS—Continued.

way, if the situation is such as to impress a reasonably prudent person that a collision will occur unless the driver having the right of way stops his car, it is his duty to do so rather than to enter the intersecting street.

Mayer v. Mellette, 54, 59 (3).

NEGLIGENCE—

See also CARRIERS 5-9; DAMAGES; MUNICIPAL CORPORATIONS 3-5; RAILROADS; STREET RAILROADS.

1. *Collision on Streets.—Contributory Negligence.—Sudden Peril.—Care Required.*—Where one about to drive an automobile into a street intersection is suddenly confronted with the peril of an impending collision with another car driven at a negligent and reckless rate of speed, he is not guilty of contributory negligence if his conduct under the circumstances and in view of the emergency is that of a person of ordinary prudence.
Mayer v. Mellette, 54, 60 (4).
2. *Collision on Streets.—Contributory Negligence.—Jury Question.*—In an action for injuries to the driver of an automobile sustained in a collision at a street intersection, answers to interrogatories showing that plaintiff, a woman, was driving west toward the crossing and that defendant's car was being driven north toward the same, that when plaintiff was about to turn into the intersecting street at a speed of eight miles an hour she looked to the north and saw defendant's car about 100 feet away approaching the crossing at a speed between thirty-five and forty miles an hour, that plaintiff began to turn southward as she entered the cross street, and, in attempting to avoid a collision with the other car, increased the speed of her automobile and ran into a telephone pole, present a case for the jury on the issue of contributory negligence.
Mayer v. Mellette, 54, 60 (5).
3. *Collision on Streets.—Evidence.—Sufficiency.*—In an action by an automobile driver for damages resulting from a collision with a telephone pole, alleged to be due to the negligence of the driver of another car, evidence showing that as plaintiff, a woman, was proceeding toward a street crossing from the east at a speed of eight miles an hour she saw defendant about 100 feet southward approaching the intersection at a speed of thirty-five to forty miles an hour, that defendant's car was headed directly toward that of plaintiff as she was making the turn into the cross street, that plaintiff, in an attempt to avoid a collision, increased the speed of her car and drove it into a telephone pole, and that immediately thereafter defendant returned and assumed responsibility for the accident, stating that he was driving too fast, is sufficient to sustain a verdict for plaintiff.
Mayer v. Mellette, 54, 61 (6).
4. *Duty to Use Due Care.*—Where a duty to exercise reasonable care is shown to exist, a failure to exercise such care is negligence.
Indiana Union Traction Co. v. Hiatt, Admr., 233, 241 (2).
5. *Duty of Exercising Reasonable Care.*—A charge of negligence may not be sustained except as based upon a failure to exercise reasonable care.
Free v. Home Telephone Co., 9, 15 (1).
6. *Imputed Negligence.—Employer and Employee.*—Where a railroad company switched cars in an elevator yard with knowledge

NEGLIGENCE—Continued.

that it was customary for workmen employed at the elevator, in going from one building to another, to pass between cars standing on the tracks, though it may have been the duty of the elevator company to warn its employees of the danger of passing between cars, its failure to do so would not excuse the negligence of the railroad company.

Dean, Admx., v. Cleveland, etc., R. Co., 225, 231 (3).

7. *Instructions.—Reasonable Care.—Jury Question.*—In an action for the death of a traveler who, while attempting to go around a train blocking a highway crossing, was run down by a train on another track, a requested instruction that if there were three routes, any of which decedent could have taken in passing around the obstructed train, one dangerous and the other two safe, decedent was guilty of contributory negligence if he took the dangerous way, was properly refused because it invaded the province of the jury, it being for the jury to determine from all the circumstances whether taking the dangerous way was negligence.

Chicago, etc., R. Co. v. Hunter, Admx., 158, 172 (6).

8. *Proof.—Res Ipsa Loquitur.—Applicability.*—Although there are instances where the proof of negligence sufficient to make a *prima facie* case under the doctrine of *res ipsa loquitur* may be supplied by a presumption arising from the occurrence of the injury, in such cases it must appear that the instrumentality which inflicted the injury was in control of the defendant, subject to his use and inspection, and that the accident was one which in the ordinary experience of mankind would not have happened except for the negligence of the defendant or of others for whose negligence he is legally responsible, and, if the injury might have resulted from any one of many causes, the complaining party must exclude by a fair preponderance of the evidence the operation of those causes for which the defendant is under no legal obligation.

Looney v. Prest-O-Lite Co., 617, 622 (3).

NEGOTIABLE INSTRUMENTS—

See **BILLS AND NOTES.**

NEW TRIAL—

See **APPEAL** 11, 14, 23, 25, 36, 43, 49, 53, 85.

1. *Grounds.—Action on Contract.—Excessive Damages.*—That the damages assessed are excessive is not a ground for a new trial in an action on contract.

Kerr v. State, ex rel., 102, 108 (5).

2. *Grounds.—Error in Amount of Recovery.*—The mere fact that a verdict is for an amount greater than asked in the complaint is not available as a ground for new trial, if in fact the evidence entitles plaintiff to the amount found by the verdict.

Aufderheide, Trustee, v. Heward, 286, 289 (6).

3. *Grounds.—Excessive Damages.*—In an action for wrongful death, where there is some evidence to warrant the amount of recovery, and nothing to indicate that the jury acted from prejudice, partiality or corruption, it was not error for the trial court to deny new trial on the ground of excessive damages.

Pere Marquette R. Co. v. Chadwick, 95, 101 (5).

NEW TRIAL—Continued.**4. Motion.—Waiver by Filing Motion in Arrest of Judgment.—**

A motion in arrest of judgment filed before the motion for a new trial waives the latter, hence a motion for a new trial filed after a motion in arrest of judgment is of no effect and presents no question for consideration on appeal.

Treloar v. Harris, 22, 23 (1).

5. Motion for.—Time for Filing.—Statute.—

Under §587 Burns 1914, Acts 1913 p. 848, providing that application for a new trial may be made at any time within thirty days from the time the verdict or decision is rendered, but, if the term of court is adjourned before the expiration of the thirty-day period, the motion may be filed in the office of the clerk of the court, and not afterwards, where the term at which judgment was rendered adjourned and a new term convened within the thirty-day period, the motion for new trial was properly filed with the court, the proviso for filing with the clerk applying only when the motion is filed during vacation and within the thirty days allowed by the statute.

Allen v. Powell, 601, 604 (1).

NOTARIES—

Foreign, certificates, sufficiency, see **ACKNOWLEDGMENT**.

NOTICE—

See **APPEAL** 8-10, 12, 91; **CARRIERS** 10, 11; **DISMISSAL AND NON-SUIT**; **MECHANICS' LIENS**.

Judicial, court records, see **EVIDENCE** 6, 7.

NUISANCE—

What constitutes, see **DEATH** 2, 5.

OFFICERS—

Public, interest in public contract, effect, see **MUNICIPAL CORPORATIONS** 1, 2.

OPINIONS—

See **EVIDENCE** 8, 9.

ORDINANCES—

Violation of, negligence, proximate cause, see **MUNICIPAL CORPORATIONS** 3.

PARENT AND CHILD—

Death of minor, elements of damage, see **DEATH**.

Dependency of parent, workmen's compensation, see **MASTER AND SERVANT** 47-53.

PAROL CONTRACTS—

See **CONTRACTS** 5.

PARTIES—

Final judgment, parties affected, see **JUDGMENT** 5.

On appeal, see **APPEAL** 5-10.

Plaintiffs, interest, statute, see **INSURANCE** 42.

PASSENGERS—

See **CARRIERS**; **RAILROADS** 10, 11.

PERSONAL INJURIES—

See **DAMAGES**; **MASTER AND SERVANT**; **RAILROADS**; **STREET RAILROADS**.

PLEADING—

Pleading in particular actions, see also the specific topics.

Review of rulings on, see **APPEAL** 77, 80.

Complaint, amendment, presumption, see **APPEAL** 50.

Sufficiency of complaint, assignment of error, see **APPEAL** 17.

1. *Complaint.—Requisites.—Avoiding Defense.*—Where the facts pleaded show a cause of action, and also a defense thereto, the complaint is insufficient unless it also contains other averments which avoid such defense.

Continental Ins. Co. v. Bair, 502, 511 (3).

2. *Complaint.—Requisites.*—A complaint must state the cause of action in certain and direct terms, sufficient to fully inform the defendant of what he is called upon to meet, but need not elaborate details which are not essential to that end.

Carter v. Richart, 255, 260 (3).

3. *Complaint.—Admissions.—Sufficiency.*—A complaint which merely alleges that certain relatives of one mentally incompetent removed her from one state to another for the purposes of care and medical attention, does not admit that such relatives changed her domicile. *Hayward v. Hayward*, 440, 469 (19).

4. *Complaint.—Pleading Conclusions.*—In an action for the death of a factory employe based on the Employer's Liability Act (§§8020a-8020k Burns 1914, Acts 1911 p. 145), a conclusion in the complaint "that said injury to said decedent was caused directly by the obedience of said decedent to the order of" a foreman, was sufficiently supported by averments of fact that defendant's foreman had charge of the work and that he ordered decedent to place a line of telephone wire on the joists and ceiling of a factory room across a line shaft and over an unguarded shaft coupling, which was revolving at a high rate of speed, and that in conforming to such order decedent was caught by the coupling and received the injury resulting in death. *Indiana Mfg. Co. v. Coughlin, Admr.*, 268, 278 (5).

5. *Complaint.—Pleading Conclusions.*—In an action for the death of a factory employe caught by a defective coupling on a line shaft while engaged in the installation of a telephone system, a complaint based on the Employer's Liability Act (§§8020a-8020k Burns 1914, Acts 1911 p. 145), meets the requirements of the act by alleging facts showing that decedent was ordered by his employer to work at a place made dangerous by its negligence, and while performing such work as ordered and by reason of conformance to the order, decedent received the injury causing his death, and any averment, by way of conclusion, with reference to other employes being required to work at such place was not essential to the sufficiency of the pleading, and conclusions in the complaint that a coupling on a line shaft "was unguarded so as to protect from injury the employes of defendant corporation who worked about the same" and "that in the course of said employment and in pursuance to the in-

PLEADING—Continued.

structions of said defendant, decedent was on said day engaged in putting up a system of telephone wires in defendant's said factory in the vicinity of said shaft coupling," were sufficiently supported by averments of fact showing the character of the work which defendant required of decedent, the nature of the order and directions given to decedent by defendant, that in conforming to such order and directions decedent was required to be and was, in fact, brought in close proximity to the coupling, and that the coupling was unguarded and was in motion when decedent was directed to do the work which brought him in contact with it.

Indiana Mfg. Co. v. Coughlin, Admr., 268, 277 (4).

6. *Complaint.—Pleading Conclusions.*—In an action for the death of a servant caused by a defective coupling on a line shaft in defendant's factory, conclusions in the complaint "that to comply with the orders and directions of said defendant then and there given to decedent it was necessary for said decedent to and he did go close alongside of and over said shaft coupling," and "that said unguarded shaft coupling was at a place where workmen of said defendant, including decedent, were, at the time of the placing of said telephone wires, required to go," were, in so far as they were material, sufficiently supported by averments of fact that defendant directed that the wire be placed on the joists and ceiling of the factory room along the line shaft approximately two feet over a rapidly revolving shaft coupling which defendant had negligently failed to guard, and that the employment, as directed by defendant, brought the decedent alongside and over the coupling.

Indiana Mfg. Co. v. Coughlin, Admr., 268, 276 (3).

7. *Complaint.—Pleading Conclusions.*—In an action for the death of a servant caused by a defective coupling on a line shaft in defendant's factory, a conclusion in the complaint "that in the course of said employment and in compliance with instructions given by said defendant corporation to said decedent, said decedent was, on said day, engaged in putting up a system of telephone wire in defendant's said factory" was sufficiently supported by averments of fact that defendant directed that the wire be placed on the joists and ceiling of the factory room through a course along the line shaft within a space of approximately two feet over the shaft coupling, and that the employment, so directed, brought decedent alongside of and over the alleged defective coupling.

Indiana Mfg. Co. v. Coughlin, Admr., 268, 276 (2).

8. *Cross-Complaint.—Failure to Answer.—Waiver.*—In an action against several defendants on a note, where defendant indorsers sought by cross-complaint, to which no answer was filed, to charge the remaining defendant with being primarily liable, and the trial court and the parties proceeded on the theory of determining the rights of the defendants as between themselves as well as their liability to the holder, the indorsers by so proceeding waived answer to their cross-complaint, and it will be regarded on appeal as having been put at issue by an answer of general denial. *Hedges v. Mehring, 586, 597 (5).*

9. *General Denial.—Evidence Admissible.*—In an action to recover on a promissory note, all the facts pleaded in plaintiff's

PLEADING—Continued.

reply tending to contradict defendant's claim that she is surety for her husband were admissible under the general denial.

Trinkle v. Ladoga Building, etc., Assn., 415, 423 (4).

10. *Answers.—Allegations in Petition.—Admission by Failure to Traverse.*—Facts alleged in a petition for distribution of a decedent's estate must be taken as conceded, where not traversed by answer. *Hayward v. Hayward, Admr.*, 440, 446 (1).

11. *Answer.—Cross-Complaint.—What Constitutes.*—In an action on a note against several defendants, a pleading filed by part of the defendants setting up facts to show that they indorsed the note in due course of business after negotiation, and that another defendant was the original maker, and which sought to have her property first exhausted to satisfy any judgment that might be rendered on the note, is a cross-complaint, though denominated an answer.

Hedges v. Mehring, 586 594 (2).

12. *Theory.—Sufficiency.*—Where a theory of a pleading has been adopted by the parties, its sufficiency must be determined on appeal upon that theory.

Indiana Mfg. Co. v. Coughlin, Admr., 268, 278 (6).

POLICY—

See **INSURANCE**.

POSSESSION—

Wrongful, of deed, effect in passing title, see **DEEDS**.

PREMIUMS—

See **INSURANCE**.

PRESUMPTIONS—

See **EVIDENCE**.

On appeal, see **APPEAL** 51-56.

PRINCIPAL AND AGENT—

See also **CONTRACTS** 6; **DEEDS** 3; **INSURANCE**.

Principal's Liability to Third Persons.—Agent's Authority.—Evidence.—Sufficiency.—In an action against an employer for breach of a contract to employ plaintiff as a part consideration for his release of claims for personal injuries, evidence that defendants had a liability insurance policy and, in accordance with its provisions, notified the insurer of the accident, that its agent negotiated a settlement with plaintiff for his injuries, obtaining a written release from him for all claims for damages on the promise that he would be re-employed, that the employer accepted the release and subsequently interposed it as a defense to plaintiff's action for his injuries, and that defendants, when informed by plaintiff that he was to be re-employed as a part consideration for the execution of the release, assured him that he would be given employment, was sufficient to warrant a finding by the jury that the insurer's agent had authority to represent defendants in making the settlement.

Carter v. Richart, 255, 263, 265 (6).

PRINCIPAL AND SURETY—

See also **BILLS AND NOTES; HUSBAND AND WIFE; JUDGMENT 4.**

Recognizance bonds, release of sureties, surrender of principal, costs, see **BAIL; BASTARDS.**

Suretyship.—Nature of Obligation.—A surety is one who becomes bound simply for the accommodation of his principal and receives no consideration for the favor he bestows, the test of suretyship being the receipt of the consideration.

Trinkle v. Ladoga Building, etc., Assn., 415, 422 (1).

PROCESS—

Service.—Necessity.—Cross-Complaint.—In an action against several defendants on a note, where the question of suretyship is presented by several defendants by cross-complaint, such issue may be determined at the trial of the principal cause, as to all parties in court on the complaint, without new process issued on the cross-complaint, it being the duty of such parties to take notice thereof without summons, and where they actually participate in the trial of the case, either with or without answer to the cross-complaint; they are bound by the judgment thereon.

Hedges v. Mehring, 586, 595 (3).

PROMISSORY NOTES—

See **BILLS AND NOTES.**

PROXIMATE CAUSE—

See **MUNICIPAL CORPORATIONS 3.**

PUBLIC IMPROVEMENTS—

See **BRIDGES; MUNICIPAL CORPORATIONS.**

PUBLIC POLICY—

Contracts, interest of public officer, see **MUNICIPAL CORPORATIONS 2.**

QUIETING TITLE—

See **JUDGMENT 1.**

Estoppel to assert title, see **ESTOPPEL 4.**

RAILROADS—

See also **CARRIERS; DEATH; NEGLIGENCE 6, 7; STREET RAILROADS.**

1. *Crossings.—Blocking with Trains.—Statute.*—Although §2671 Burns 1914, Acts 1905 p. 747, makes it a misdemeanor for one in charge of a freight train to allow it to stand without an opening therein across a highway, it also imposes a duty on the railroad company not to block highway crossings with freight trains or cars.

Chicago, etc., R. Co. v. Hunter, Admz., 158, 169 (3).

2. *Crossing Accidents.—Obstructing Crossing.—Duty to Give Signals of Approach of Another Train.*—Where a railroad company, in violation of a statute, obstructs a highway crossing with a standing freight train, and a traveler departs from the highway and goes upon the railroad's right of way adjacent to the crossing only for the purpose of going around the train

RAILROADS—Continued.

and over the tracks to the street on the other side, he is not a trespasser as respects the railroad's duty to him to give the statutory signals of the approach to the crossing of a train on another track.

Chicago, etc., R. Co. v. Hunter, Admx., 158, 170 (5).

3. *Crossing Accidents.—Contributory Negligence.—Evidence.—Instructions.*—In an action for death in a railroad crossing accident, an instruction that it could not be assumed in the first instance that decedent was guilty of contributory negligence, that the burden of that issue was on defendant and that it must be established by a preponderance of the evidence, is not objectionable as requiring defendant to prove contributory negligence by affirmative evidence, especially as another instruction informed the jury that in determining where the preponderance is on any issue, it should look to all the evidence in the case.

Chicago, etc., R. Co. v. Hunter, Admx., 158, 166 (2).

4. *Crossing Accident.—Instructions.—Negligence.—Proof.*—In an action for death in a railroad crossing accident, where negligence was predicated on the blocking of a highway crossing by a freight train and the negligent running of another train backward on an adjacent track, instructions do not authorize a recovery on proof of only one of the negligent acts complained of where each instruction respectively states what facts will authorize a finding that defendant is guilty of negligence in respect to each act charged, and that if decedent was killed by such negligence in respect to each act, defendant would be liable, "provided all the other material allegations of the complaint are proven."

Chicago, etc., R. Co. v. Hunter, Admx., 158, 170 (4).

5. *Crossing Accidents.—Contributory Negligence.—Complaint.—Sufficiency.*—In an action for the death of one killed in a railroad crossing accident by being run down by a cut of cars while attempting to go around a train which blocked the crossing, an allegation in the complaint that decedent was familiar with the crossing and its environments, especially when considered with other averments tending to show that his conduct was not different from that of a man of ordinary prudence, does not render the complaint demurrable as showing deceased guilty of negligence contributing to his injury, since on that issue the burden is on defendant, and a demurrer on that ground will be sustained only when the averments of the complaint show affirmatively, or necessitate the inference of, contributory negligence.

Chicago, etc., R. Co. v. Hunter, Admx., 158, 165 (1).

6. *Crossing Accidents.—Action for Death.—Variance Between Allegation and Proof.—Harmless Error.*—In an action against a railroad for death in a crossing accident under a complaint averring that decedent was struck by a train at the street crossing, and the evidence showed that he was killed on the railroad's right of way adjacent to the crossing while attempting to go around defendant's train, which he had a right to do because it was unlawfully obstructing the highway, the variance between allegation and proof was immaterial, where the complaint proceeded on the theory that decedent was on

RAILROADS—Continued.

the crossing when injured in that defendant owed him the care which it owed to travelers generally on its crossing.

Chicago, etc., R. Co. v. Hunter, Admx., 158, 173 (7).

7. *Injury to Licensee.—Duty of Railroad Company.—Negligence.—Contributory Negligence.—Jury Question.*—Where a railroad company switched cars in a yard about an elevator with knowledge that workmen employed at the elevator, in going from one building to another, frequently passed over the switching tracks between cars standing thereon, and an elevator employe was crushed and killed between two cars which the railroad's switching crew moved without warning, it was a question for the jury whether the railroad's duty to exercise reasonable care had been discharged and whether in passing between the cars decedent was guilty of contributory negligence.

Dean, Admx., v. Cleveland, etc., R. Co., 225, 231 (2).

8. *Injury to Licensee.—Duty of Railroad Company.*—In an action against a railroad company for wrongful death, where the evidence shows that the railroad in switching cars in the yards about an elevator had knowledge that it was customary for the elevator company's employes, in going from one building to another, to cross the switch tracks between cars standing thereon, the railroad was under a duty to use reasonable care in switching its cars to avoid injuring such employes and its failure to do so is actionable negligence. (*Lake Erie, etc., R. Co. v. Gaughan* [1900], 26 Ind. App. 1, overruled.)

Dean, Admx., v. Cleveland, etc., R. Co., 225, 231, 232 (1).

9. *Injuries to Persons at Station.—Complaint.—Negligence.*—In an action against a railroad for wrongful death, where the averments of the complaint disclosed the existence of a relation between the road and decedent imposing a duty on defendant to exercise reasonable care, a general charge of negligence is sufficient as against demurrer.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 241 (3).

10. *Injuries to Persons at Station.—Action.—Contributory Negligence.—Question for Jury.*—In an action against an interurban railroad for death at a highway crossing, where the evidence showed that it was the road's custom to stop its local car for passengers at a highway crossing when signaled to do so, that decedent's husband signaled an approaching limited car running on the schedule of the local car, that the motorman gave two short blasts of the whistle, the usual response to a signal to stop, and that decedent, blinded by the car's powerful headlight and hindered thereby from comprehending the situation, was killed while attempting to cross the tracks ahead of the supposed local car in order to get to the proper place to board the same, the question of decedent's contributory negligence was for the jury.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 244 (6).

11. *Injuries to Persons at Station.—Action.—Evidence.—Admissibility.—Prejudicial Error.*—In an action against an interurban railroad for wrongful death, where it was charged that decedent was killed on a crossing by failure of defendant to stop its car upon the giving of the customary signal in answer to which the motorman had made the usual response, two short blasts of the whistle, the admission of testimony by a locomotive engineer that, upon such a signal as was given, proper railroading requires that the whistle be sounded two short

RAILROADS—Continued.

blasts and that the locomotive be brought to a stop, was prejudicial error, since it was given by a witness not qualified as an expert in the operation of electric interurban cars and the evidence had a tendency to confuse the jury, because foreign to the theory of the complaint, which did not predicate negligence on the mere fact that the car failed to stop on being signaled, but upon the fact that defendant's motorman, having given the customary response to the signal to stop, thereby led decedent to believe that the car would slow down and stop at the crossing.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 246, 247, 248 (7).

12. *Injuries to Persons at Station.—Action.—Signals from Car.—Evidence.—Admissibility.*—In an action against an interurban railroad for wrongful death, plaintiff's action being predicated on defendant's failure to stop its car on signal on a highway crossing, where plaintiff introduced evidence that it was the custom of motormen on local cars to give two short blasts of the whistle when they intended to stop in response to signal, it was permissible for defendant to introduce evidence that proper operation required all cars to give such a response to signal, but that only local cars stopped, the response merely indicating that the signal had been observed, as such testimony was pertinent to the question whether decedent was justified in believing that an approaching car, which struck decedent as she was attempting to cross the track, was going to stop.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 250 (11).

13. *Injuries to Persons at Station.—Answers to Interrogatories. Contributory Negligence.*—In an action against an interurban railroad company for wrongful death, the action being predicated on defendant's failure to stop its car on signal at a certain highway crossing in accordance with an established custom, findings by the jury in answers to interrogatories that defendant had been in the custom of stopping its local cars, when signaled, at a certain highway crossing to take on passengers, that plaintiff's wife was killed on the tracks by a limited car running on the schedule of a local car, the limited, when signaled by decedent's husband, having given two short blasts of the whistle, the usual response, and that decedent tried to cross the track ahead of the approaching car, did not affirmatively show decedent guilty of contributory negligence in attempting to cross the tracks in front of the car, the headlight of which blinded her so that she was unable to comprehend the situation, for the purpose of getting to the right side of the track to board the supposed local car, and such findings are not inconsistent with the general verdict for plaintiff.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 242 (5).

14. *Injuries to Persons at Station.—Action.—Complaint.—Sufficiency.—Contributory Negligence.*—In an action against a railroad for wrongful death, where the complaint contained general averments that decedent was in the exercise of due care and was free from negligence, and the facts specifically averred do not affirmatively show as a matter of law that decedent was guilty of contributory negligence, the complaint is sufficient as against the objection that it affirmatively shows that decedent was guilty of negligence contributing to her death.

Indiana Union Traction Co. v. Hiatt, Admr., 233, 241 (4).

REAL PARTY IN INTEREST—

Public, in guardianship proceedings, see **INSANE PERSONS 3.**

RECEIVERS—

Right of action, general creditors as beneficiaries, see **INSURANCE 4.**

1. *Corporations.—Fraud.—Powers of Receiver.*—A receiver, in his capacity as representative of the general creditors, may avoid transactions had by the corporation in fraud of their rights.
Welliver, Rec., v. Coate, 195, 217 (8).

2. *Corporations.—Fraud upon General Creditors.*—Where claims are based on transactions had by a corporation, and which are binding on it, but are fraudulently prejudicial to the general creditors, the receiver as representative of the creditors holds adversely to the corporation.

Welliver, Rec., v. Coate, 195, 217 (9).

RECOGNIZANCE—

See **BAIL; BASTARDS.**

RECORDS—

Preparation and contents, see **APPEAL 13-15.**

REINSTATEMENT—

Of action, pleading, notice, see **DISMISSAL AND NONSUIT.**

RELEASE—

Of claim for damages, see **APPEAL 80; CONTRACTS 4; PRINCIPAL AND AGENT.**

REMAINDERS—

See **WILLS 4.**

RES ADJUDICATA—

Certified question of law by Industrial Board, answer, effect, see **MASTER AND SERVANT 66.**

RESERVATION—

Parol, effect, see **FIXTURES 4; FRAUDS, STATUTE OF.**

RES GESTAE—

See **EVIDENCE 10.**

RESIDENCE—

See **DOMICIL.**

RES IPSA LOQUITUR—

Application of doctrine, see **MASTER AND SERVANT 6; NEGLIGENCE 8.**

“REVERT”—

Construction, see **WILLS 5.**

REVIEW—

See APPEAL 35-32.

RISK—

Assumption, see MASTER AND SERVANT 12.

RULES OF COURT—

See APPEAL 12, 23, 28, 29, 37; COURTS 4.

SERVANTS—

See MASTER AND SERVANT.

SET-OFF—

See APPEAL 88.

SIGNALS—

See RAILROADS 2, 12.

SILENCE—

See ESTOPPEL 7.

SPEED—

Ordinance, violation, see MUNICIPAL CORPORATIONS 3.

STATUTES—

Cited and construed, see p. xxvii.

1. *Construction*.—A statute is to be construed as a whole and that construction adopted which will carry out the intent of the legislature. *In re Maranovitch*, 489, 491 (1).
2. *Construction*.—In construing a statute, its several provisions must be read together, and such construction given it, if possible, as will be consistent with all its provisions. *Chicago, etc., R. Co. v. Priddy*, 552, 561 (4).
3. *Construction*.—*Scope and Purpose*.—In construing an act of the legislature the courts may take into consideration the general scope and purpose of the act and the condition that prevailed at the time of its passage. *In re Boyer*, 408, 410 (1).
4. *Executive Construction*.—*Force and Effect*.—The opinion of the auditor of state interpreting a statute which he is charged to enforce, or the opinion of the Attorney-General in construing such statute, is not binding on the courts, but the fact that such opinions were obtained is entitled to weight in determining the *bona fides* of action based thereon. *Welliver, Rec., v. Coats*, 195, 210 (2).

STAY—

Of proceedings, discretion of court, see COSTS.

STREET RAILROADS—

See also CARRIERS; NEGLIGENCE; RAILROADS.

1. *Injuries to Person*.—*Instructions*.—*Pleading and Proof*.—In an action for injuries to person, an instruction directing a verdict for plaintiff if the jury found "that the plaintiff sus-

STREET RAILROADS—Continued.

tained injuries as alleged in the complaint," and that they were sustained by reason of defendant's negligence, is erroneous as not limiting the right of recovery to the acts of negligence alleged in the complaint, since, in an action for damages predicated on negligence, plaintiff is only entitled to recover on proof of acts of negligence charged in the complaint, regardless of what other negligence may be disclosed by the evidence. *Indianapolis, etc., Traction Co. v. Sherry*, 1, 4 (2).

2. *Injury to Property.—Contributory Negligence.—Burden of Proof.—Instructions.*—In an action for injuries to person and property sustained in a collision with a street car, an instruction placing on defendant the burden of proof as to the entire issue of contributory negligence is erroneous, since, in actions for damages to personal property, the burden is on the plaintiff not only to aver and prove that the injury to his property was caused by the negligence of the defendant, but also that he was not guilty of contributory negligence proximately causing the injury.

Indianapolis, etc., Traction Co. v. Sherry, 1, 3 (1).

3. *Collision in Streets.—Action.—Evidence.—Sufficiency.—Negligence.—Contributory Negligence.*—In an action against a street railroad company for injuries sustained in a collision with a street car, evidence tending to show that plaintiff, as he was about to drive a team and wagon over the car tracks at a street intersection, looked for approaching cars but saw none, that when he got upon the tracks he was struck by a car that did not sound the gong or give other signal of its approach, that the headlight was insufficient for cars running in the locality where the accident occurred, and that the car was traveling at such a high rate of speed that plaintiff was thrown fifty feet when struck and the car ran 100 feet after the accident before it was brought to a stop, is sufficient to warrant the conclusion that plaintiff was free from contributory negligence and that the defendant was negligent.

Indianapolis Traction, etc., Co. v. Vaughn, 581, 583 (2).

STREETS—

See MUNICIPAL CORPORATIONS 3-6.

SURETYSHIP—

See PRINCIPAL AND SURETY.

SURVEYOR—

Appointment, power of commissioners, see COUNTIES.

SURVEYS—

Correctness of, see APPEAL 60; BOUNDARIES.

SURVIVORSHIP—

Words of, construction, see WILLS 8.

TENDER—

1. *Tender of Money.—Elements.*—Where money is to be paid, a tender, to be effective, must involve the proper amount and

TENDER—Continued.

be unconditional, and the circumstances of the offer must be such as to leave the creditor free to accept the amount offered without prejudice to him, and without thereby rendering himself liable to be held to have impliedly admitted that the amount tendered is all that is due.

Kingan & Co. v. Maryland Casualty Co., 301, 320 (9).

2. *Conditional Tender.—Effect.*—In an action by the insured against an insurer, a statement by a representative of the insurer, that he desired to tender insured the amount of money which the company claimed to be the amount due and offered a certain sum in full settlement of its liability, to which the insured replied by refusing the tender with the statement that he did so because he understood that the offer was made on the theory that the amount tendered covered the insurer's entire liability, to which no reply was made, the offer by the insurer was conditional and did not constitute a valid tender.

Kingan & Co. v. Maryland Casualty Co., 301, 319, 321 (8).

TESTAMENTS—

See **WILLS**.

TEXT-BOOKS—

Cited, see p. xxx.

THEORY—

Pleading, determining, see **APPEAL** 40, 42; **PLEADING** 12.

TRANSCRIPT—

See **APPEAL** 9, 10, 18, 29.

TRANSPORTATION—

See **CARRIERS**.

TRESPASS—

1. *Complaint.—Legal Title.—Proof.*—In an action in trespass, where plaintiff merely alleged that she held the legal title to the land involved, she was entitled to prove any pertinent facts tending to show legal title, which includes title by adverse possession, and it was error for the trial court to require that she show record title.

Ingram v. Jeffersonville, etc., Transit Co., 532, 540 (8).

2. *Complaint.—Issues.—Proof.*—In an action in trespass, under a complaint alleging ownership of land and possession at the time of the trespass, plaintiff is entitled to prove possession, the trespass and injury to the property interfering with the right of possession, and the damages sustained without first proving a record title to the realty involved.

Ingram v. Jeffersonville, etc., Transit Co., 532, 539 (7).

3. *Damages.—Elements.*—Under a complaint alleging both title and possession of real estate in plaintiff, there may be a recovery of damages against a wrongdoer for trespass upon the realty resulting in injury thereto and an interference with the possessory rights of plaintiff therein.

Ingram v. Jeffersonville, etc., Transit Co., 532, 538 (5).

TRESPASS—Continued.

4. *Extent of Possession.—Evidence.—Deeds.*—In an action in trespass where plaintiff alleged that she was in possession of the land involved and that she was wrongfully excluded therefrom, a deed to plaintiff sufficient to give color of title authorized her to claim possession of all the land described therein, though actual possession may have extended only to a portion thereof, and such deed was admissible in evidence to show the extent and character of plaintiff's possession.
Ingram v. Jeffersonville, etc., Transit Co., 532, 538 (4).
5. *Right to Sue.—Character of Possession.*—Rightful possession at the time of the trespass is sufficient to warrant an action therefor, though the party injured, because of the wrongful conduct of the trespasser or for other reasons, may be out of possession when the action is begun.
Ingram v. Jeffersonville, etc., Transit Co., 532, 539 (6).

TRIAL—

See also **NEW TRIAL**.

Review of rulings at trial, see **APPEAL**.

Trial of particular actions or proceedings, see also the specific topics.

1. *Directing Verdict.*—Questions of fact must be submitted to the jury for its determination whenever the evidence furnishes reasonable grounds for inferring the facts essential to a recovery and it is only where there is a total absence of some substantial evidence upon an essential issue or when there is no conflict and the evidence is susceptible of but one inference and that favorable to the party asking for a peremptory instruction that such an instruction shall be given.
Dean, Adm., v. Cleveland, etc., R. Co., 225, 232 (4).
2. *Dismissal as to Certain Parties.—Findings and Conclusions of Law.*—Where an action to quiet title was dismissed as to certain defendants, findings of fact and conclusions of law as to such parties are outside the issues and unwarranted.
Busick v. Busick, 655, 675 (10).
3. *Findings.—Ultimate and Evidentiary Facts.*—Only ultimate facts may be properly embodied in a finding, and a mere evidentiary fact included therein does not strengthen it.
Kingan & Co. v. Maryland Casualty Co., 301, 319 (7).
4. *Findings.—Failure to Find.—Effect.*—In an action to quiet title predicated ownership on adverse possession, the absence of a finding of any one of the elements of possession necessary to title by adverse possession is fatal to the cause of action, since the failure to find will be construed as an adverse finding.
Benedict v. Bushnell, 365, 368 (2).
5. *Findings of Facts.—Ultimate and Evidentiary Facts.*—Ultimate issuable facts are proper in special findings and they must control the conclusions of law drawn from the facts, since evidentiary facts, though specially found, are improper and unauthorized.
American Liability Co. v. Bowman, 109, 126 (11).
6. *Instructions.—Construction.*—Instructions should be considered together. *Continental Ins. Co. v. Bair*, 502, 528 (23).
7. *Instructions.—Necessity for Request.*—Where instructions as to the measure of damages for breach of a contract to employ plaintiff state the rule correctly in general terms, but failed

TRIAL—Continued.

to direct the jury to deduct interest from the amount allowed for wages to be earned in the future, the giving of the instructions is not reversible error in the absence of a tender of more specific instructions on the subject.

Carter v. Richart, 255, 267 (11).

8. *Instructions.*—"When."—In an action to quiet title, where plaintiff contended that her grantee wrongfully procured the deed and inserted his name as grantee, an instruction that the burden was on grantee to prove her contention, "but when she has done so, no other person can gain any rights" under the deed, is not erroneous as assuming that plaintiff had sustained the burden of proof, the word "when" being used in the sense of "provided," or "if."

Allen v. Powell, 601, 610 (8).

TROVER AND CONVERSION—

1. *Burden of Proof.*—The vendor in an action for the conversion of certain remains of a dismantled building claimed to have been reserved orally, has the burden of proving his allegations by proper evidence.
Bricker v. Whisler, 492, 497 (2).
2. *Judgment.*—*Evidence.*—*Sufficiency.*—Where a vendor of realty, alleging that he orally reserved a dismantled building located thereon, sued the vendee for the conversion of loose and detached parts of the building and of parts remaining affixed to the land, but failed to prove the value of the loose materials, a judgment in his favor for such detached parts could not be sustained.
Bricker v. Whisler, 492, 497 (8).

TRUSTEES—*Powers of Trustee.—Barter or Exchange of Trust Property.—*

Power to sell trust property does not authorize a trustee to barter or exchange it for other property, and such power can only be exercised in conformity with the requirements of the instrument by which the trust is created and in furtherance of the ends to be attained by the creation of the trust.

Holsapple v. Shrontz, 390, 399 (8).

TRUSTS—

1. *Creation.*—The word "trust" is frequently employed to indicate duties, relations and responsibilities which are not strictly and technically trusts.
Holsapple v. Shrontz, 390, 396 (1).
2. *Creation.*—*Intent.*—The creation of a trust does not depend upon the use of any particular language or form of expression, but upon the meaning of the language employed when fairly construed in the light of the circumstances, relation, and situation of the parties, and, if the intent to create a trust is clear and the essential elements may be fairly deduced from the language used, the trust will not fail for the lack of more adequate expression.
Holsapple v. Shrontz, 390, 397 (4).
3. *Express Trust.*—*Creation.*—The term "express trust" signifies a trust created by the direct and positive acts of the parties as evidenced by some deed, will, or other instrument, wherein the language employed either expressly or by plain implication evinces an intention to create a trust.
Holsapple v. Shrontz, 390, 396 (2).

TRUSTS—Continued.

4. *Express Trusts.—Validity.—Interest of Trustee.*—The fact that the trustee named in a deed creating a trust is also given a personal interest in the real estate will not defeat the trust.

Holsapple v. Shrontz, 390, 400 (9).

5. *Express Trusts.—Trustee.—Powers.—Violation of Trust.*—Where a duly recorded deed of land from a mother to son stipulated that he was to use the rentals of the property to support the family and to educate the girls and, if sold, divide the money received equally among the members of the family, it was in contravention of the trust created by such conveyance for the son to convey the property as an individual and not as trustee, and his deed was void and the grantee did not thereby acquire any title as against the *cestui que trusts*, in view of §4016 Burns 1914, §2973 R. S. 1881, providing that every sale, conveyance, or other act of a trustee, in contravention of a trust, shall be void, and §4014 Burns 1914, §2971 R. S. 1881, providing that the record of a trust shall be deemed actual notice thereof to every person claiming under a conveyance made after such recording.

Holsapple v. Shrontz, 390, 399, 400 (7).

6. *Express Trusts.—Creation.—Requisites.*—When the settlor, the trustee, the *cestui que trust*, the property transferred to the trustee, and the object to be attained, all appear with reasonable certainty from the writing, the requirements of the law are satisfied and an express trust is thereby established which will be recognized and enforced.

Holsapple v. Shrontz, 390, 397 (5).

7. *Express Trusts.—Creation.—Deed.*—A deed for land from a mother to her son whereby he agreed to use the rentals of the property to support the family and to educate the girls, and, if finally sold, to divide the price received therefor equally among the then living heirs or members of the family if of age, otherwise to hold such shares until the minors attained their majority, creates an express trust in the land conveyed, for the purpose designated. *Holsapple v. Shrontz*, 390, 398 (6).

8. *Implied Trusts.—Creation.*—Implied trusts are those which, without being expressed, are deducible from the relation of the parties and the nature of the transaction as matters of intent, or which by operation of law are deduced from transactions of the parties as a matter of equity independent of the particular intention of the parties.

Holsapple v. Shrontz, 390, 397 (3).

ULTRA VIRES—

See CORPORATIONS 2; INSURANCE 19.

VALUE—

Agreement, effect, see CARRIERS 7.

VENDOR AND PURCHASER—

Ownership of building and land, separate ownership, knowledge, see FIXTURES 2.

VENIRE DE NOVO—

Motion for, ruling, review, see APPEAL 15.

VENUE—

Of prosecutions for failure to comply with Workmen's Compensation Act, see **MASTER AND SERVANT** 101.

VERDICT—

Review of, see **APPEAL** 14, 49, 53, 54, 57-68.

Directed, see **INSURANCE** 27.

"VEST"—

Construction, see **WILLS** 6.

WAGES—

See **CONTRACTS** 4.

WAIVER—

Definition, see **INSURANCE** 52.

Of error, see **APPEAL** 30-34, 89-91; **NEW TRIAL** 4.

Of stipulation in policy, see **INSURANCE** 8, 9, 23, 24, 28, 29, 55, 56, 62, 63.

WIFE—

See **HUSBAND AND WIFE**.

WILLS—

1. *Construction.—Ambiguity.—Application of Rules of Construction.*—A will devising certain real estate to testator's son for life and providing that "at his death the same shall vest in and equally belong to his lawful children, who may survive him," and, if such son should die, "leaving no children alive at such time, then I will and direct that such real estate shall revert to my estate," to be disposed of as directed in a subsequent item, providing for the distribution of property not specifically disposed of by the will, and that the realty devised to the son, in case he died without children, should "descend and pass" in the manner set forth in such item, is ambiguous as to when the title vests in the life tenant's children so as to require the court to determine its construction from a consideration of all its provisions to ascertain the testator's intention.
Busick v. Busick, 655, 665, 669 (2).

2. *Construction.—Descend.*—The word "descend" may be used in the sense of "go" and will be so construed where that meaning more effectually carries out the intention of the testator.

Busick v. Busick, 655, 669 (5).

3. *Construction.—Intention of Testator.*—The purpose of construing a will is to give effect to the intention of the testator as expressed by the language employed, if not inconsistent with established principles of law, but where the intention is plain there is no construction required.

Busick v. Busick, 655, 664 (1).

4. *Construction.—Limitations.—Remainders.*—A limitation in a will will not be construed as an executory devise when it can take effect as a remainder, nor a remainder to be contingent where it can be taken as vested.

Busick v. Busick, 655, 671 (8).

5. *Construction.—"Revert."*—The word "revert" may be used in the sense of "go" or "pass."
Busick v. Busick, 655, 669 (4).

WILLS—Continued.

6. *Construction.*—"Vest."—The word "vest" may denote either a vesting in interest, or a vesting in possession.
Busick v. Busick, 655, 668 (3).
7. *Construction.*—*Vesting of Estates.*—The law so favors the vesting of estates at the earliest opportunity and is so averse to a postponement thereof that they will be deemed as vesting at the earliest possible period in the absence of a clear manifestation of the contrary intention.
Busick v. Busick, 655, 670 (6).
8. *Construction.*—*Words of Postponement.*—*Words of Survivorship.*—Words of postponement in a will are presumed to relate to the beginning of the enjoyment of the estate, rather than to its vesting, and words of survivorship are presumed to relate to the death of the testator, rather than to that of the first taker, if they are fairly capable of such interpretation.
Busick v. Busick, 655, 671 (7).
9. *Construction.*—*Life Estate with Limitation Over.*—*Vesting of Estate.*—An item of a will devising a life estate in certain lands to testator's son and providing that at his death the "same shall vest in and equally belong to his lawful children, who may survive him" and that the land devised shall revert to the estate if the life tenant die leaving no children, creates a life estate, with the remainder in fee to the life tenant's children living at the time of the testator's death, subject to a diminution of their shares to let in children subsequently born during the life tenancy, and on the death of such children before their parents, the latter acquired the fee-simple title to the realty devised.
Busick v. Busick, 655, 675 (9).

WITNESSES—

See also APPEAL 83; EVIDENCE.

1. *Corroboration.*—*Impeachment.*—Where a witness has been impeached by the testimony of another witness that he had made statements out of court inconsistent with his testimony, it is proper to corroborate such witness by proving that he had also made previous statements in harmony with his testimony at the trial, but the rule does not permit the introduction of corroborating testimony to support the testimony of a witness in chief on the ground that his evidence on cross-examination tends to contradict or weaken his testimony in chief.
Continental Ins. Co. v. Bair, 502, 527 (22).
2. *Examination.*—*Assumption of Fact.*—In an action on an insurance contract, a question to a witness as to the date when he determined to approve an application for insurance and accept the risk was improper as assuming that he had authority to approve the application and accept the risk, and that he determined to do so.
Supreme Lodge, etc. v. Graham, 220, 225 (5).
3. *Examination.*—*Damages.*—*Question.*—In an action for damages to an automobile, a question as to "what it cost to repair the automobile" is objectionable as not limiting the cost of repairs, in determining the damages, to such repairs as were made necessary by defendant's negligence.
Indianapolis, etc., Traction Co. v. Sherry, 1, 7 (4).

WORDS AND PHRASES—

- "Accident arising out of and in the course of the employment," construction, see **MASTER AND SERVANT** 29.
- "Addition," meaning, see **INSURANCE** 7, 43.
- "Dependent," meaning, see **MASTER AND SERVANT** 51.
- "Descend," construction, see **WILLS** 2.
- "Express trusts," meaning, see **TRUSTS** 3.
- "Final judgment," definition, see **JUDGMENT** 5.
- "Revert," construction, see **WILLS** 5.
- "Total dependency," meaning, see **MASTER AND SERVANT** 42.
- "Vest," construction, see **WILLS** 6.
- "When," use of, construed as "if," see **TRIAL** 8.

WORKMEN'S COMPENSATION—

See **MASTER AND SERVANT** 27-101.

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